SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 400

CITY OF MARION, ILLINOIS, A MUNICIPAL CORPORATION; CONTINENTAL ILLINOIS BANK AND TRUST COMPANY, ET AL., PETITIONERS,

vs.

BEN SNEEDEN, AS RECEIVER OF THE CITY NATIONAL BANK OF HERRIN, ILLINOIS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INDEX

	Page
Record from district court of the United States, Eastern Illinois	1
Placita	1
Bill for injunction and other relief	2
Exhibit A—Trust deposit, dated August 28, 1931	10
Exhibit B—Notification by receiver of City National Bank of Herrin, dated November 11, 1931	12
Order restraining sale of certain securities	13
Order continuing restraining order in effect to December 3, 1931.	14
Order extending date to plead to December 12, 1931	15
Order continuing restraining order in effect to December 12, 1931	16
Order continuing restraining order in effect to December 22, 1931.	17
Order continuing restraining order in effect December 22, 1931	17
Motion of Continental Illinois Bank & Trust Co. to dismiss bill of complaint	18
Amendment to bill of complaint	19
Answer of treasurer of City of Marion, Illinois, to bill of complaint	20
Answer of Continental Illinois Bank & Trust Co. to bill of complaint	21
Joint and several answers of City of Marion, Illinois, etc., to bill of complaint	22
Order allowing amended bill of complaint	30
Stipulation of facts	31
Exhibit "A"—Bond of Ray C. Carroll	35
Exhibit "B"—Minutes of directors meeting	39

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 30, 1933

Page

Exhibit "C"—Resolution adopted June 13, 1930 40
Order continuing restraining order in effect to December 31, 1931 41
Order continuing restraining order in effect to January 9, 1932.. 42
Order continuing restraining order in effect to January 19, 1932, 43
Order continuing restraining order in effect to January 29, 1932. 44
Order continuing restraining order in effect to February 6, 1932. 45
Order continuing restraining order in effect to February 16, 1932. 46
Order continuing restraining order in effect to February 26, 1932. 47
Order continuing restraining order in effect to March 7, 1932.... 48
Order continuing restraining order in effect to March 17, 1932.. 49
Order continuing restraining order in effect to March 26, 1932.. 50
Memorandum opinion by Wham, J..... 51
Conclusions of law..... 54
Opinion 55
Findings of fact and conclusions of law..... 62
Order continuing restraining order in effect to March 28, 1932.. 66
Decree 67
Petition for appeal..... 72
Assignment of errors..... 72
Order allowing appeal..... 74
Bond on appeal..... 75
Præcipe for record..... 80
Certificate of clerk..... 82
Citation and service..... 83
Clerk's certificate..... 85
Proceedings in United States circuit court of appeals, seventh circuit. 87
Placita 87
Appearance of counsel for appellee, Continental Illinois Bank and Trust Company..... 87
Appearance of counsel for appellee, City of Marion..... 88
Appearance of counsel for appellant..... 89
Notice of motion for leave to appear as amicus curiæ..... 90
Affidavit of service..... 91
Motion 92
Affidavit in support of motion..... 93
Suggestions in support of motion..... 96
Appearance of amicus curiæ..... 98
Order granting leave to appear as amicus curiæ and file brief..... 99
Order extending time of appellee to file briefs..... 99
Order setting cause for hearing..... 100
Hearing 100
Opinion, Sparks, J..... 101
Judgment 127
Memo. in re filing petition for rehearing..... 127
Memo. in re filing answer to petition for rehearing..... 128
Order denying petition for rehearing..... 128
Stipulation that mandate be stayed, etc..... 129
Order recalling and staying mandate..... 130
Clerk's certificate..... 131
Order allowing certiorari..... 133

Pleas in the District Court of the United States, within and for the Eastern District of Illinois, at a Special Term thereof, begun and held in the United States Court Room, in the City of East St. Louis, in said District, before Honorable Fred L. Wham, Judge of said Court, on the First Monday of April, in the year of our Lord One Thousand Nine Hundred and Thirty Two, and of the Independence of the United States of America, the One Hundred and Fifty Sixth Year. Placita.

* * (Caption) * *

Be it remembered, that heretofore, to-wit: on the 13th day of November, A. D. 1931, came Ferrell and Hay, attorneys for Ben Sneeden, as Receiver of The City National Bank of Herrin, Illinois, plaintiff herein, and filed in the office of the Clerk of said court in a cause entitled as above captioned, a Bill For Injunction and Other Relief, in Equity No. 4494, which said Bill of Complaint was and is in words and figures, the following, to-wit:

Nov. 13. 3 IN THE DISTRICT COURT OF THE UNITED STATES

For the Eastern District of Illinois.

Ben Sneeden, as Receiver of The City National Bank of Herrin, Illinois,

Complainant,

vs.

City of Marion, Illinois, a municipal corporation, Continental Illinois Bank and Trust Company, a corporation, and the Fidelity and Casuaty Company of New York, a corporation,

Defendants.

BILL FOR INJUNCTION AND OTHER RELIEF.

To the Honorable Judge of the District Court of the United States for the Eastern District of Illinois, In Chancery Sitting:

Your orator, Ben Sneeden, as Receiver of The City National Bank of Herrin, respectfully represents unto the Court as follows:

1. That your orator is the duly appointed, qualified and acting receiver of The City National Bank of Herrin, a national banking association organized and existing under and by virtue of the Acts of Congress of the United States and located in the City of Herrin, County of Williamson and State of Illinois, by virtue of his appointment as such receiver heretofore on, to wit, October 22, 1931, made by the Comptroller of the Currency of the United States of America; that the City of Marion, Illinois, is a municipal corporation of the County of Williamson and State of Illinois; and that the Continental Illinois Bank and Trust Company, is a banking association organized and existing under and by virtue of the laws of the State of Illinois, and is located in the City of Chicago, County of Cook and State of Illinois and that the Fidelity and Casualty Company of New York is a corporation duly licensed to do business in the State of Illi-

nois, with an office in the City of Chicago, County of Cook and State of Illinois.

4 2. That your orator, as receiver of said The City National Bank of Herrin, is engaged in the winding up of the affairs of said bank under the direction of the Comptroller of the Currency of the United States and that this action is a suit for the winding up of the affairs of said bank.

3. That said bank failed to open for business on the business day of October 21, 1931, and has remained closed and suspended ever since; that prior to the suspension of said bank said bank owned and held the following described bonds and securities:

$2000 Par Value National Steel Company 5% 1956 First Mortgage Sinking Fund;

$2000 Par Value Puget Sound Power and Light 4½% of 1950 First Refunding;

$3000 Par Value Commonwealth Edison Company 3½% 1932;

$2000 Par Value Laclede Gas Light Company 5% of 1934;

$1000 Gary Electric and Gas Company 5% of 1934;

$1000 Texas Corporation 5% 1934;

$2000 Par Value City of Chicago 4% of 1933 Street Lighting;

$2000 Par Value City of Detroit Refunding 4½% 1932;

$2000 State of Illinois Highway 4% of 1942;

$4000 United States Treasury 3⅛% of 1949.

4. That the City of Marion, Illinois, is a municipal corporation organized and existing under the laws of the State of Illinois; that subsequent to, to wit, the 25th day of August, 1931, and prior to, to wit, October 21, 1931, one Ray C. Carroll, the City Treasurer of the City of Marion, Illinois, deposited in said The City National Bank above mentioned funds of said City of Marion, Illinois, by the name and style of Ray C. Carroll, City Treasurer and on, to wit, October 21, 1931, the date of the closing of said bank, said Ray C. Carroll, as City Treasurer of the City of Marion, Illinois, had on deposit in said The City National Bank the sum of $16,430.00.

5 5. That Section 5153 of the Revised Statutes of the United States, among other things, provides with reference to deposit of moneys in national banks, as follows:

"Any association may, upon deposit with it of public money of a state or any political subdivision thereof, give security for the safe keeping and prompt payment of the money so

deposited, of the same kind as is authorized by the law of the state in which such association is located in the case of other banking institutions in the state."

That the City of Marion, Illinois, one of the defendants herein, has adopted what is commonly known as the "Commission Form of Government" as provided by an Act of the General Assembly of the State of Illinois entitled "An Act to Amend an Act entitled 'An Act to Provide for the incorporation of cities and villages' approved April 10, 1872, in force July 1, 1872, and all Acts amendatory thereto by adding thereto Article 13" and is now and for more than one year last past has been operating under and pursuant to said act. Section 51 of said act above mentioned (Cahill's Illinois Revised Statutes 1931 page 412) provides as follows:

"In addition to the other duties now imposed by law upon the treasurer of any city or village, the said treasurer shall make his daily deposits of such sums of money as shall be received by him from all sources of revenue whatsoever to his credit as treasurer of said city or village, in one or more banks situated in said city or village, to be selected by the president of said council, the commissioner of accounts and finance, and the treasurer of such city or village, or by any two of them, and any such bank, before any such deposit is made therein, shall be required to enter into an obligation with the said council to pay into the treasury of such city or village interest on the monthly balances of such deposits at a rate to be fixed by the president of said council, the commissioner of accounts and finance, and the treasurer, or by any two of them, and which rate may be changed in the same manner—such rate to be not less than three (3) per centum per annum, and shall also execute a good (and) sufficient bond, with sureties to be approved by the president of the said council, and conditioned that such bank will safely keep account for, and pay over said money. Said president of the council, the commissioner of accounts and finance and the treasurer, in the selection of any such depository bank, shall take into consideration the reputation and solvency thereof, and the sufficiency of the security offered by such bank. All interest paid by any such bank upon such balances shall be collected by the treasurer of said city or village, and shall be by him reported in his next statement following such collection, and shall be considered and treated as a part of the general fund of such city or village, subject to use for any legitimate municipal purpose.

6. That in an effort to and for the purpose of securing the deposits of said Ray Carroll, as treasurer of said city of Marion, Illinois, in said The City National Bank, said City National Bank on, to wit, August 28, 1931 deposited with said Continental Illinois Bank and Trust Company, one of the defendants herein, the bonds and securities of said City National Bank of Herrin, Illinois, above mentioned, said deposit being made pursuant to a certain purported
6 trust deposit or articles of agreement between said The City National Bank of Herrin, Illinois, and said Continental Illinois Bank and Trust Company, a true and correct copy of which said trust deposit or articles of agreement is hereto attached marked "Exhibit A" and made a part hereof by attachment and reference. That said bonds and securities above mentioned were on, to wit, August 28, 1931 and are now owned by said bank and that your orator, as receiver of such bank is in custody of all the assets and property thereof and is entitled to the possession of said bonds and securities above mentioned; that said bonds and securities above mentioned are now held by said Continental Illinois Bank and Trust Company, one of the defendants herein, under and pursuant to said purported trust deposit or articles of agreement hereto attached and marked "Exhibit A" and heretofore referred to.

7. That the deposit by said City National Bank of the aforementioned bonds and securities with said Continental Illinois Bank and Trust Company above mentioned was illegal and void and of no force and effect in that said City National Bank was only authorized under and pursuant to the laws of the United States to give security for the safe keeping and prompt payment of the said moneys of the City of Marion, Illinois, of the same kind as is authorized by the law of the State of Illinois in the case of other banking institutions in said State of Illinois; that said City National Bank of Herrin, Illinois, was not at the time of said deposits, or any of them, nor is it now located in said City of Marion, Illinois, and that said City National Bank of Herrin, Illinois did not, before any of the said deposits were made, enter into an obligation with said council of said City of Marion, Illinois, to pay to the treasurer of said City of Marion interest on the monthly balance of such deposits at a rate fixed by the president of said council, the commissioner of accounts and finance of said city and the treasurer of said city, or by any two of them, at not less than three per cent

per annum and said City National Bank did not execute a good and sufficient bond with sureties approved by the president of said council conditioned that said City National Bank of Herrin would safely keep and account for and pay over
7 said moneys; that said City National Bank of Herrin, Illinois, did not enter into any bond whatsoever with said City of Marion, Illinois, or any of the officials of said city of Marion, Illinois, conditioned as aforesaid but did purport and attempt to secure said deposit by depositing said bonds and securities of said bank with said Continental Illinois Bank and Trust Company as aforementioned; that no resolution of the Board of Directors of said City National Bank was ever adopted or passed by said Board authorizing or empowering the officers of said City National Bank to deliver or pledge said bonds and securities aforementioned, or any part thereof, as aforementioned; that the delivery of said bonds and securities was a fraud upon the general creditors and depositors of said City National Bank; that such delivery of said bonds and securities was wholly without the powers of said bank and the officers thereof and was an ultra vires act of said bank and of said officers and was and is wholly void and of no force and effect; that no title to or interest in or lien against said bonds and securities, or any part thereof, was acquired by any of the defendants herein by the aforesaid delivery thereof to said Continental Illinois Bank and Trust Company; that none of said defendants have any title to or interest in or lien against any of said bonds and securities but that your orator is entitled to the possession and custody thereof and that said moneys of said City of Marion, Illinois, deposited in said City National Bank as aforesaid, were not at the times of said deposits or at any other time the moneys of the United States.

8. That it is provided in and by said trust deposit or articles of agreement heretofore mentioned marked "Exhibit A," in substance, that if the moneys deposited by said City of Marion, Illinois in said City National Bank as aforementioned are not paid upon demand that in each and every such event said Continental Illinois Bank and Trust Company is given full and irrevocable power and authority to sell the said securities or any part thereof without advertising and without further demand and without giving notice to said City National Bank, or any one else, at any public or private sale or sales, or at any broker's board, and the
8 net proceeds thereof, after the payment of all costs, expenses and attorneys' fees of said Continental Illinois

Bank and Trust Company and its charges growing out of or connected with the said securities, and the care, safekeeping and delivery thereof, shall be applied to the payment of any and all said deposits with said City National Bank and to the payment of any and all liabilities and obligations whether due or not of said City National Bank to the said treasurer of the City of Marion, Illinois, and the surplus, if any, to be paid to said bank; that said bonds and securities are negotiable in character and are transferable by delivery merely and if sold cannot be traced by your orator; that said bonds and securities are of great value being of the value of more than $21,000.00 but that their present market value is depreciated and if sold now will not bring their real value and that if said bonds and securities are sold by said defendant herein, Continental Illinois Bank and Trust Company, they will bring far less than the real value thereof and the creditors and depositors of said City National Bank of Herrin will thereby suffer immediate and irreparable injury, loss and damage; that there are a great number of depositors and creditors of said City National Bank of Herrin, Illinois, having deposits herein of more than the sum of $300,000.00.

9. That your orator, as receiver of said City National Bank, has elected to and has disaffirmed and repudiated the alleged pledge of said bonds and securities as aforesaid and the purported agreement between said City National Bank and said Continental Illinois Bank and Trust Company and has so notified each of the defendants herein as is hereinafter stated.

10. That your orator, in an endeavor to prevent the sale of said bonds and securities aforesaid, did on the 11th day of November, 1931, send by United States mail, post paid, to each of the defendants herein, at their addresses as known to your orator, namely, City of Marion, Illinois, at Marion, Illinois, Continental Illinois Bank and Trust Company at Chicago, Illinois, and Fidelity and Casualty Company of New York at Chicago, Illinois, a written notification of his repudiation of said attempted pledge and said contract, a copy of which is hereto attached marked "Exhibit B" and made a part of this, your orator's bill of complaint by attachment and reference.

9 11. Your orator further represents that it appears in and from said "Exhibit A" heretofore mentioned that said defendant, the Fidelity and Casualty Company of New York, has some interest affected by this proceedings, either

as surety on the bond of said city treasurer to said City of Marion, Illinois, or otherwise, and that said Fidelity and Casualty Company of New York is therefore made a party defendant herein.

12. Your orator further represents that since said Continental Illinois Bank and Trust Company, defendant herein, is by said "Exhibit A" heretofore mentioned purported to be given the right by said City National Bank of Herrin, Illinois, to sell said aforementioned bonds and securities without notice of any kind whatsoever to said City National Bank and without advertising and that there is grave danger that said purported right may be attempted to be exercised by said Continental Illinois Bank and Trust Company unless restrained by the order of this Honorable Court and that if your orator should give said Continental Illinois Bank and Trust Company notice of the filing of this bill of complaint and of the intended application for a temporary injunction by your orator that said defendant, Continental Illinois Bank and Trust company, may elect to exercise its purported rights under said "Exhibit A" as heretofore mentioned and that such sale would therefore be made before notice of this application could be served upon said Continental Illinois Bank and Trust Company or said other defendants herein, or either of them, and before a hearing can be had upon such application and that if such sale is made immediate and irreparable injury, loss and damage will be caused to your orator and the creditors of said City National Bank before such notice can be so served or such hearing had.

Forasmuch, Therefore, as your orator is without adequate remedy at law in the premises, your orator prays:

(1) That a subpoena may be issued out of this Honorable Court directed to the defendants, City of Marion, Illinois, of Marion, Illinois, Continental Illinois Bank and Trust Company of Chicago, Illinois, and the Fidelity and Casualty Company of New York of Chicago, Illinois, requiring and commanding them and each of them to appear in this cause upon a day certain and to answer the several allegations in this bill of complaint, but not under oath, the answer under oath being hereby expressly waived;

(2) That said delivery and alleged pledge of the said bonds and securities be adjudicated and decreed an illegal and ultra vires act on the part of said bank and the officers thereof, and that your orator be placed in possession thereof by the decree of this Court;

(3) That said defendants may be enjoined from disposing of said bonds and securities, or any part thereof, in any manner whatsoever;

(4) That a preliminary writ of injunction may issue immediately out of this Court directed to the Continental Illinois Bank and Trust Company, the City of Marion, Illinois and the Fidelity and Casualty Company of New York, commanding them to refrain from disposing of any of said bonds and securities and from causing the same to be disposed of in any manner whatsoever until the further order of this Court;

(5) That this Honorable Court may enter its temporary restraining order, ordering the defendants, City of Marion, Illinois, the Continental Illinois Bank and Trust Company and the Fidelity and Casualty Company of New York from disposing of any of said bonds and securities in any manner whatsoever until such time as the Court may designate; and

(6) That your orator may have such other and further relief in the premises as equity may require and to this Honorable Court shall seem meet.

And Your Orator Will Ever Pray.

Signed—BEN SNEEDEN
As Receiver of the City National Bank of Herrin, Illinois.

FERRELL AND HAY
Sgd—HOSEA V. FERRELL
Sgd—JOHN HAY
Solicitors for Complainant.

11 IN THE DISTRICT COURT OF THE UNITED STATES

For the Eastern District of Illinois.

State of Illinois
County of Williamson } ss.

BEN SNEEDEN, being first duly sworn, upon his oath deposes and says that he, as receiver of The City National Bank of Herrin, Illinois, is the complainant in the foregoing bill of complaint; that he has carefully read said bill of complaint and is acquainted with the matters and the statements

therein contained; that the matters and things therein stated and alleged are true in substance and in fact.

And further affiant saith not.

Signed—BEN SNEEDEN

On this 12th day of November, 1931, came Ben Sneeden before me and, after first taking solemn oath before me, subscribed his name to the foregoing affidavit under such oath.

Signed—EDNA WELTON
Notary Public.

(Seal)

12 "EXHIBIT A."

Continental Illinois Bank and
Trust Company, TSDO No. 24181
231 South La Salle Street,
Chicago, Illinois.

Attention: Trust Department

Gentlemen:

We hereby deliver to you the $23,000.00 Par Value Securities, described in your receipt (s), Numbered:

102100/10

issued to us contemporaneously herewith, and which, together with any additional securities which we may hereafter deposit hereunder, we direct you to hold in escrow to secure any and all deposits heretofore made with us by Treasurer, City of Marion, Illinois of monies and funds belonging to said City or chargeable to him, or for which he is accountable as such Treasurer and any and all deposits of such funds and monies that he may hereafter make with us. And in the event that such monies and funds, or any part thereof, are not paid to said Treasurer upon demand, then in each and every such event we hereby give you full and irrevocable power and authority to sell the said securities, or any part thereof, without advertising and without further demand, and without giving notice to us or any one else; at any public or private sale or sales, or at any broker's board, and the net proceeds thereof, after the payment of all costs, expenses, and your attorneys' fees and your charges growing out of or connected with the said securities deposited as aforesaid with you, and the care, safekeeping and delivery thereof, shall be applied to the payment of any and all said deposits with us

and to the payment of any and all liabilities and obligations, whether due or not, of us, to the said Treasurer and the surplus if any shall be paid to us.

It is understood that we shall be entitled at any time and from time to time to make substitutions for any collateral at any time on deposit hereunder, upon delivery to you at the time of any proposed substitution, of a consent thereto in writing signed by said Treasurer, City of Marion and the Fidelity & Casualty Co. of New York. Any collateral so substituted shall be subject to all the terms and conditions herein provided with respect to the collateral originally deposited hereunder.

Prior to default on our part in complying with the demand for payment by said Treasurer as aforesaid we shall be entitled to receive the accruing interest on said securities, and you may either collect such interest for us or deliver to us the coupons representing, such interest as such coupons may from time to time mature. In all other respects the securities, prior to such default, shall be subject to the joint order of said Treasurer as aforesaid, The Fidelity & Casualty Company of New York the surety on his official bond, and ourselves.

Dated Aug 28 1931 1931.

CITY NATIONAL BANK, HERRIN, ILLINOIS
By R. A. KARR
Its Vice President.

(City National Bank Seal
Herrin, Illinois)

Attest:
By JOE P. BENSON
Its Cashier.

13 We acknowledge receipt of the securities above referred to, and agree to hold the same in accordance with the terms of the foregoing.

CONTINENTAL ILLINOIS BANK AND TRUST COMPANY
By T. M. WAGSHAL
Assistant Secretary.

Dated Aug 28 1931 1931

(Executed in Quadruplicate)

14 "EXHIBIT B."

Herrin, Illinois

To City of Marion, Illinois, and

To Continental Illinois Bank and Trust Company, and

To Fidelity & Casualty Company of New York:

Referring to the deposit of the following described bonds and securities by The City National Bank of Herrin, Illinois, with the Continental Illinois Bank and Trust Company of Chicago, Illinois, pursuant to a purported agreement between said The City National Bank of Herrin, Illinois and the Continental Illinois Bank and Trust Company, of Chicago, Illinois, dated the 28th day of August, 1931, to wit: $2000.00 National Steel Company, 5% 1956 First Mortgage Sinking Fund; $2000.00 Pudget Sound Power & Light, 4½%, 1950 1st Ref; $3000.00 Commonwealth Edison Co. 3½% 1932; $2000.00 Laclede Gas Light Co. 5% 1934; $1000.00 Gary Elec. & Gas Co. 5% 1934; $1,000.00 Texas Corp. 5% 1934; $2000.00 City of Chicago 4% 1933 Street Lighting; $2,000.00 City of Detroit Refunding 4½% 1932; $2,000.00 State of Ill. Highway 4% 1942; $4,000.00 U. S. Treasury, 3⅛% 1949.

You Are Hereby Notified that said The City National Bank of Herrin, Illinois, is now closed and that I, Ben Sneeden, have been appointed receiver thereof by the Comptroller of the Currency of the United States of America on, to wit, October 22, 1931.

You Are Further Notified that I am advised that said The City National Bank of Herrin, Illinois, had no power or authority to deposit the aforementioned bonds and securities with said Continental Illinois Bank and Trust Company or to enter into the aforementioned purported agreement and that such purported deposit of said The City National Bank of Herrin, Illinois, and the entering into of said purported agreement was and is illegal and void, and

You Are Further Notified that as such receiver I have elected to and hereby do disaffirm and repudiate such deposit and said purported agreement by and between said The City National Bank of Herrin, Illinois, and said Continental Illinois Bank and Trust Company above mentioned and You and Each of You Are Hereby Notified to return the above mentioned bonds and securities to me, as such receiver, and demand for such return is hereby officially made by me, as such receiver, upon you and each of you and You and Each of

You Are Hereby Notified to take no steps in any respect whatsoever with reference to selling or disposing of any part or portion of the bonds and securities above mentioned.

Kindly Take Notice and Govern Yourselves and Each of You Accordingly.

Dated this the 11th day of November, A. D. 1931.

BEN SNEEDEN
As Receiver of the City National Bank of Herrin, Illinois.

15 Endorsed: * * (Caption) * * Bill for Injunction and Other Relief Filed Nov 13 1931 D. H. Reed, Clerk. Ferrell and Hay, Solicitors for Complainant.

16 And on the same day, to-wit: on the 13th day of November, A. D. 1931, the following further proceedings were had in said court in said cause, and entered of record, to-wit: Entered N 1931.

17 * * (Caption) * *

ORDER OF COURT.

And now on this 13th day of November, A. D. 1931, it is ordered, adjudged and decreed by the Court that the City of Marion, Illinois, the Continental Illinois Bank and Trust Company of Chicago, Illinois, and the Fidelity and Casualty Company of New York of Chicago, Illinois, is hereby ordered to refrain from selling or in any way disposing of any of the following described bonds and securities:

$2000 Par value National Steel Company 5% 1956 First Mortgage Sinking Fund;
$2000 Par value Pudget Sound Power and Light 4½% of 1950 First Refunding;
$3000 Par value Commonwealth Edison Company 3½% 1932;
$2000 Par value Laclede Gas Light Company 5% of 1934;
$1000 Gary Electric and Gas Company 5% of 1934;
$1000 Texas Corporation 5% 1934;
$2000 Par value City of Chicago 4% of 1933 Street Lighting;
18 $2000 Par value City of Detroit Refunding 4½% 1932;
$2000 State of Illinois Highway 4% of 1942;
$4000 United States Treasury 3⅛% of 1949.

It appearing to the Court from the verified bill of complaint filed herein that immediate and irreparable injury, loss and damage will result to the complainant before a notice can be served on said City of Marion, Illinois, said Continental Illinois Bank and Trust Company and said Fidelity and Casualty Company of New York and a hearing had upon the application for a temporary writ of injunction and that such injury will occur by reason of an immediate sale of said bonds and securities which are the property of the complainant herein and which are in the custody of said Continental Illinois Bank and Trust Company; that said bonds are negotiable in character and cannot be readily traced upon transfers thereof; that by such impending sale and the manner of the same the full value of said bonds and securities will not be realized thereon and the value thereof as determined by said sale will be far less than the actual value thereof and that thereby said complainant will suffer immediate and irreparable injury and damage.

It Is Further Ordered that this order shall expire on the 23rd day of November, A. D. 1931, at 11:15 o'clock A. M.

Approved and Ordered Entered this 13th day of November, A. D. 1931, at the hour of 11:15 o'clock in the forenoon.

(Signed) FRED L. WHAM
Presiding Judge.

19 Endorsed: * * (Caption) * * Bill for Injunction and Other Relief Order of Court Filed Nov 13 1931 D. H. Reed, Clerk. Ferrell and Hay, Solicitors for Complainant.

Nov. 23. 20 And afterwards, to-wit: on the 23rd day of November, A. D. 1931, the following further proceedings were had in said Court in said Cause, and entered of record, to-wit:

21 * * (Caption) * *

ORDER OF COURT.

And now on this 23rd day of November, A. D. 1931, it is ordered, adjudged and decreed by the Court that the former restraining order and decree of this court entered in this cause on the 13th day of November, A. D. 1931 at the hour of 11:15 o'clock in the forenoon and expiring at the hour of

11:15 o'clock in the forenoon of November 23rd, 1931, ordering that the defendants in said cause refrain from in any manner disposing of the bonds and securities therein described, be and the same is hereby continued and extended in full force and effect until Thursday, the 3rd day of December, 1931, at the hour of 11 o'clock in the forenoon.

This order is entered by the Court for the reason that in the opinion of the Court the question involved is of considerable public interest and the Court desires that all parties shall be fully prepared to acquaint the Court with the authorities respecting the matters herein involved.

It is further ordered, adjudged and decreed by the Court that the hearing upon the matters of the issuance of a preliminary writ of injunction in this cause is continued to the 3rd day of December, 1931, at the hour of 11 o'clock in the forenoon at which time, such hearing is set.

22 This order is made returnable on the 3rd day of December, 1931, at 11 o'clock in the forenoon and shall expire at that time.

Approved and ordered entered at 11 o'clock in the forenon, November 23rd, 1931.

(Signed) FRED L, WHAM
U. S. District Judge.

23 Endorsed: * * (Caption) * * Order of Court Entered Filed Nov 23 1931 D. H. Reed, Clerk.

24 And afterwards, to-wit: on the 30th day of November, A. D. 1931, the following further proceedings were had in said court in said cause and entered of record, to-wit: Entered No 1931.

25 * * (Caption) * *

Monday, November 30th, A. D. 1931.

Present: Honorable Fred L. Wham, Judge.

Now on this 30th day of November, A. D. 1931, upon due motion, and the Court being fully advised in the premises, It Is Ordered By the Court that the date to plead herein be, and the same is hereby extended to December 12th, A. D. 1931.

red Dec. 3, 31.

26 And afterwards, to-wit: on the 3rd day of December, A. D. 1931, the following further proceedings were had in said court in said cause, and entered of record, to-wit:

27 * * (Caption) * *

ORDER OF COURT.

And now on this 3d day of December, A. D. 1931, it is ordered, adjudged and decreed by the Court that the former order and decree of this Court entered in this cause on November 13, 1931, and extended until December 3, 1931, by the order of this Court, entered herein on November 23, 1931, be and the same is hereby extended and continued in full force and effect until the 12th day of December, A. D. 1931, at 1:30 o'clock in the afternoon, upon the motion of the defendants.

The reasons for the entering of this order are that counsel for defendants, Pope and Driemeyer, show the Court that they have just recently been engaged as counsel in this cause and have not had sufficient time in which to prepare for the hearing upon the matter of the issuance of the preliminary writ of injunction in this cause; and that all parties hereto, by their respective counsel, stipulate and agree in open Court that said temporary restraining order be continued in full force and effect as hereinbefore ordered.

28

The hearing upon the matter of the issuance of the preliminary writ of injunction in this cause is hereby continued until, and is set for the 12th day of December, A. D. 1931.

This order shall expire, and is returnable at, the 12th day of December, A. D. 1931, at the hour of 1:30 o'clock in the afternoon.

Approved and Ordered Entered at the hour of 11 o'clock in the forenoon of December 3, A. D. 1931.

(Signed) FRED L. WHAM,
Presiding Judge.

29 Endorsed: * * (Caption) * * Order of Court. Filed Dec. 3, 1931. D. H. Reed, Clerk. Law Offices of Ferrell and Hay, First National Bank Building, Marion, Illinois.

30 And afterwards, to-wit: on the 11th day of December, A. D. 1931, the following further proceedings were had in said court in said cause, and entered of record, to-wit: Entered D 1931.

31 * * (Caption) * *

Friday, December 11th, A. D. 1931.

Present: Honorable Fred L. Wham, Judge.

Now on this 11th day of December, A. D. 1931, upon due motion and the Court being fully advised in the premises, It Is Ordered by the Court, that defendants be and they are hereby given until December 22nd, A. D. 1931, in which to plead hereto.

32 And afterwards, to-wit: on the 12th day of December, A. D. 1931, the following further proceedings were had in said court in said cause, and entered of record, to-wit: Entered D 1931.

33 * * (Caption) * *

ORDER OF COURT.

And Now on this 12th day of December, A. D. 1931, upon the suggestion of the Court because of the pressure of other business it is ordered, adjudged and decreed by the Court that the former order and decree of this Court entered in this cause on November 13th, 1931, and extended until December 3rd, 1931, by the order of this Court, entered herein on November 23rd, 1931, and again extended until December 12th, 1931, by the order of this Court entered herein on December 3rd, 1931, be and the same is hereby extended and continued in full force and effect until the 22nd day of December, 1931, at 10 o'clock in the forenoon, all parties hereto agreeing thereto and their respective counsel stipulating and agreeing that said temporary restraining order be continued in full force and effect as hereinbefore ordered. The hearing upon the matter of the issuance of the preliminary writ of injunction is hereby continued until and is set for the 22nd day of December, 1931.

34 This order shall expire and is returnable on the 22nd day of December A. D. 1931, at the hour of 10 o'clock in the forenoon.

Approved and Ordered Entered at the hour of 10 o'clock in the forenoon of December 12th, 1931.

(Signed) FRED L. WHAM,
Presiding Judge.

35 Endorsed: * * (Caption) * * Order of Court. Entered December 12, 1931. D. H. Reed, Clerk. Pope & Driemeyer, Attorneys and Counselors at Law, 24 North Main Street, East St. Louis, Illinois.

ec. 21, 36 And afterwards, to-wit: on the 21st day of December, A. D. 1931, there was filed in the office of the Clerk of said Court in said Cause, Motion to Dismiss on behalf of Defendant Continental Illinois Bank and Trust Company, a Corporation, which said Motion to Dismiss was and is in words and figures the following, to-wit:

37 * * (Caption) * *

MOTION OF CONTINENTAL ILLINOIS BANK AND TRUST COMPANY, A CORPORATION, ONE OF THE DEFENDANTS HEREIN, TO DISMISS THE BILL OF COMPLAINT.

(This motion withdrawn by leave of court 12/22/31)

D. H. REED,
Clerk.

Now comes Continental Illinois Bank and Trust Company, one of the defendants in the above cause, and moves the court to dismiss the bill of complaint herein because it says:

1. That it appears on the face of said bill of complaint that the same is wholly without equity.
2. The facts pleaded in said bill of complaint are insufficient to constitute a valid cause of action in equity.
3. That it appears on the face of the bill of complaint that Ray C. Carroll is a necessary and indispensable party to this cause, and that the plaintiff has failed to join him as a party defendant hereto.

Wherefore, this defendant prays that the said bill of complaint may be dismissed.

(Signed) MAYER, MEYER, AUSTRIAN & PLATT,
Solicitors for said defendant, Continental Illinois Bank and Trust Company.

(Signed) CARL MEYER
(Signed) DAVID F. ROSENTHAL
(Signed) RICHARD MAYER
Of Counsel.
H. F. DRIEMEYER

Endorsement: In Equity No. 4495 District Court of the United States, Eastern District of Illinois Ben Sneeden, etc. vs. City of Marion, Illinois, etc. Motion to Dismiss. Filed Dec 21 1931 D. H. Reed, Clerk. Mayer, Meyer, Austrian & Platt 231 South LaSalle Street Chicago Telephone State 0600.

67 And on the same day, to-wit: on the 22nd day of December, A. D. 1931, there was filed in the office of the Clerk of said Court in said Cause, Amendment to Bill of Complaint, by leave of court, which said Amendment to Bill of Complaint, was and is in words and figures the following, to-wit: Filed Dec. 1931.

68 • • (Caption) • •

AMENDMENT TO BILL OF COMPLAINT.

Filed Dec. 22, 1931. D. H. Reed, Clerk.

The complainant, Ben Sneeden, as Receiver of The City National Bank of Herrin, of Herrin, Illinois, pursuant to leave of this Court heretofore granted on the 22d day of December, A. D. 1931, comes and amends his bill of complaint in the above entitled cause as follows:

1. By inserting immediately after the words "and the Fidelity and Casualty Company of New York, a corporation" contained in the style of said cause in said bill of complaint, the name "Ray C. Carroll, as Treasurer of the City of Marion, Illinois".

69 2. By inserting immediately following line 17 of page 2 of said bill of complaint, the following: "and that Ray

C. Carroll is the duly appointed, qualified and acting Treasurer of the City of Marion, Illinois".

3. By inserting in the 17th line of page 12 of said bill of complaint immediately after the word "Illinois" and immediately before the word "required", the following: "and Ray C. Carroll, as Treasurer of the City of Marion, Illinois".

4. By inserting in line 11 on page 13 of said bill of complaint immediately after "New York" and immediately before "command", the following: "and Ray C. Carroll, as Treasurer of the City of Marion, Illinois".

5. By inserting in line 19 of page 13 of said bill of complaint immediately after "New York" and immediately before "from" the following: "and Ray C. Carroll, as Treasurer of the City of Marion, Illinois".

Signed—BEN SNEEDEN,
As Receiver of the City National Bank of Herrin, of Herrin, Illinois.

Signed—HOSEA V. FERRELL and
Signed—JOHN HAY
Solicitors for Complainant.

Endorsed: * * (Caption) * * Amendment to Bill of Complaint. Filed Dec. 22, 1931. D. H. Reed, Clerk. Law Offices of Ferrell and Hay, First National Bank Bldg., Marion, Illinois.

Dec. 22, 38 And afterwards, to-wit: on the 22nd day of December, A. D. 1931, there was filed in the office of the Clerk of said Court in said Cause, Answer of the defendant Ray C. Carroll, as Treasurer of the City of Marion, Illinois, which said Answer was and is in words and figures, the following, to-wit:

38½ * * (Caption) * *

ANSWER OF THE DEFENDANT, RAY C. CARROLL, AS TREASURER OF THE CITY OF MARION, ILLINOIS, TO THE BILL OF COMPLAINT.

And Now comes the defendant, Ray C. Carroll, as Treasurer of the City of Marion, Illinois, and for answer to the bill of complaint in this cause as amended says that he adopts as his answer to said bill of complaint as amended the answer

made and filed for and on behalf of the defendant, City of Marion, Illinois.

Sgd—R. T. Cook & Pope & Driemeyer,
Attorneys for Defendant, Ray C. Carroll, as Treasurer of the City of Marion, Illinois.

Endorsed: * * (Caption) * * Answer of the Defendant, Ray C. Carroll, as Treasurer of the City of Marion, Illinois, to the Bill of Complaint. Filed Dec. 22, 1931. D. H. Reed, Clerk.

39 And on the same day, to-wit: on the 22nd day of December, A. D. 1931, there was filed in the office of the Clerk of said Court in said Cause, Answer of Continental Illinois Bank and Trust Company, which said Answer was and is in words and figures, the following, to-wit: Filed Dec. 1931.

40 * * (Caption) * * *

THE ANSWER OF CONTINENTAL ILLINOIS BANK AND TRUST COMPANY, A CORPORATION, ONE OF THE DEFENDANTS, TO THE BILL OF COMPLAINT OF BEN SNEEDEN, AS RECEIVER OF THE CITY NATIONAL BANK OF HERRIN, ILLINOIS, COMPLAINANT.

Continental Illinois Bank and Trust Company, a corporation, one of the defendants in the above entitled cause, answering the bill of complaint, hereby adopts as its answer to the bill filed in this case the joint and several answers made and filed for and on behalf of the City of Marion, Illinois and The Fidelity and Casualty Company of New York, certain of the defendants herein.

Continental Illinois Bank and Trust Company, a corporation, one of the defendants herein.
By—Signed—Mayer, Meyer, Austrian & Platt
Its Solicitors.

Endorsed: * * (Caption) * * Answer of Continental Illinois Bank and Trust Company, one of the defendants herein. Filed Dec. 22, 1931. D. H. Reed, Clerk. Mayer, Meyer, Austrian & Platt, 231 South LaSalle Street, Chicago.

41 And on the same day, to-wit: on the 22nd day of December, A. D. 1931, there was filed in the office of the Clerk of said Court in said Cause, Joint and Several Answers of the City of Marion, Illinois, and the Fidelity and Casualty Company of New York, which said Joint and Several Answers was and is in words and figures, the following, to-wit:

42 * * (Caption) * *

JOINT AND SEVERAL ANSWERS OF THE CITY OF MARION, ILLINOIS AND THE FIDELITY AND CASUALTY COMPANY OF NEW YORK TO THE BILL OF COMPLAINT OF BEN SNEEDEN, RECEIVER, ETC., COMPLAINANT.

For answer to the bill of complaint of the complainant in the above entitled cause, the defendants, City of Marion, Illinois and The Fidelity and Casualty Company of New York, severally answering, say:

1. Answering the first paragraph of the bill, these defendants admit the allegations therein contained.

2. Answering the second paragraph of the bill, these defendants admit the allegations therein contained.

3. Answering the third paragraph of the bill, these defendants admit that The City National Bank of Herrin failed to open for business on October 21, 1931 and has remained closed and suspended ever since, and that prior to the suspension of said Bank it owned the bonds and securities in the third paragraph of the bill of complaint described, subject, however, to the lien of these defendants thereon.

4. Answering the fourth paragraph of the bill these defendants admit the allegations therein contained.

5. Answering the fifth paragraph of the bill, these defendants admit the allegations therein contained, but not the legal effect of the Federal or State Statutes therein quoted.

43 6. Answering the sixth paragraph of the said bill, these defendants admit that said The City National Bank of Herrin did, prior to the 25th day of August, 1931, deposit with defendant, Continental Illinois Bank and Trust Company, the bonds and securities of said The City National Bank of Herrin in paragraph Three of the bill described; these defendants say that said deposit of such bonds and securities by said The City National Bank of Herrin with Con-

tinental Illinois Bank and Trust Company was made under these circumstances:

Ray Carroll had been appointed Treasurer of the City of Marion and was required as such Treasurer to execute bond with good and sufficient security to be approved by the council payable to said City and conditioned for the faithful performance of the duties of the office and the payment of all moneys received by such officer according to law and the ordinance of said City; said Carroll applied to the defendant, The Fidelity and Casualty Company of New York, which was then and now is engaged in the surety business, to execute as surety his official bond as such Treasurer, and this defendant, The Fidelity and Casualty Company of New York, agreed to execute as surety the official bond of said Carroll, as such Treasurer, provided said Carroll could procure a bank which would secure the deposit of the public money of the City of Marion by him made in said bank by pledge of some of its assets which would be satisfactory to the defendant, The Fidelity and Casualty Company of New York, as collateral security therefor; there was then no bank in the said City of Marion, and The City National Bank of Herrin, upon being informed of the situation as in this paragraph of this answer heretofore expressed, agreed with said Ray Carroll and the defendant, The Fidelity and Casualty Company of New York, that if said Ray Carroll would deposit in said bank the public money of the City of Marion coming into his hands as Treasurer, it would deposit with the defendant, Continental Illinois Bank and Trust Company, the bonds and securities in Paragraph Three of the bill of complaint described for the purposes and under the terms and conditions as expressed and contained in the document in Paragraph Six of the bill of complaint referred to and a correct copy of which is annexed to the bill of complaint and identified as "Exhibit A"; thereupon said The City National Bank of Herrin
44 did transmit to the defendant, Continental Illinois Bank and Trust Company, the bonds and securities in Paragraph Three of the bill of complaint described, with the original of the document a copy of which is annexed to the bill of complaint herein and identified as "Exhibit A" executed by its officers, R. A. Karr, its Vice-President, and Joe P. Benson, its Cashier; after said bonds and securities were received by the defendant, Continental Illinois Bank and Trust Company, and the original of said document identified as "Exhibit A" to the bill of complaint herein had been ex-

ecuted by the Assistant Secretary of said Continental Illinois Bank and Trust Company, the defendant, The Fidelity and Casualty Company of New York, executed, as surety, the official bond of said Ray Carroll, as Treasurer of the City of Marion, and said Ray Carroll, as such City Treasurer, did then make his initial deposit of public money of the City of Marion in said The City National Bank of Herrin; these defendants further answering say that all deposits of public money of the City of Marion made in The City National Bank of Herrin by said Ray Carroll, as Treasurer, were made only because of the security given by said bank therefor, and that said deposits would not have been made except for the fact that they were secured in manner and form as herein stated, and that the defendant, The Fidelity and Casualty Company of New York, would not have executed, as surety, the bond of said Ray Carroll, as such City Treasurer, if said agreement for the securing of the deposits by said Ray Carroll, as Treasurer, so made had not been made and entered into; these defendants further answering say that the securities in Paragraph Three of the bill of complaint described now remain in the custody of Continental Illinois Bank and Trust Company, as Trustee, under the provisions of the agreement hereinabove referred to; these defendants deny that complainant is entitled to the possession of said bonds and securities above mentioned and say that the defendant, Continental Illinois Bank and Trust Company, is entitled to the possession of said securities for all of the uses and purposes in said agreement hereinabove referred to expressed.

7. Answering the seventh paragraph of said bill, these defendants deny that the deposit by said The City National Bank of Herrin of the aforementioned bonds and securities with said Continental Illinois Bank & Trust Company
45 was illegal and void for any of the reasons in said paragraph of said bill mentioned; these defendants say that there was no statute of the State of Illinois in force and effect at any of the times in question prohibiting banking institutions other than National Banks in the State of Illinois from giving security for the safe keeping and prompt payment of public moneys deposited with them of the kind and character and in the manner as was done by The City National Bank of Herrin as alleged in the bill of complaint herein, and that under the law of the State of Illinois banking institutions in the State of Illinois other than National Banks

were at the time of the transactions in question authorized to give security for the safe keeping and prompt payment of public moneys with them deposited in manner and form as did The City National Bank of Herrin, as alleged in the bill of complaint herein; these defendants admit that The City National Bank of Herrin was not at the time of any of the deposits made with it by Ray Carroll, as City Treasurer of Marion, located in said City of Marion, and that said City National Bank did not execute at the time of receiving said deposits a bond with sureties approved by the President of the Council of the City of Marion conditioned that said Bank would safely keep and account for and pay over said moneys, or any other bond whatsoever; these defendants further answering deny that said The City National Bank of Herrin did not before any of said deposits were made enter into an obligation with said City Council of the City of Marion to pay to its Treasurer interest on the monthly balance of deposits of city money in such bank made, but these defendants say that said The City National Bank of Herrin did agree to pay to the City of Marion interest on the monthly balance of deposits of city money in such bank at the rate of three per cent per annum; these defendants further answering deny that no resolution of the Board of Directors of the said The City National Bank of Herrin was ever adopted or passed by said Board authorizing or empowering the officers of said Bank to deliver or pledge said bonds and securities aforementioned, or any part thereof, in manner and form as was done, but say that as a matter of fact, the Board of Directors of said The City National Bank of Herrin did, at a meeting by them held on the 13th day of June, 1930, adopt a resolution of which the following is a true copy:

46. "Resolved that the President and Cashier of The City National Bank of Herrin, Illinois, be hereby empowered to set aside with any third party as Trustee any of the unpledged assets of the said Bank as security for a deposit in said Bank of any funds so deposited by any School Treasurer, City Treasurer, Township Treasurer, State Treasurer, Postmaster depositing postal savings funds, or any Receiver for any closed bank or other public institution, in conformity to law to secure such deposit which belongs to any of the municipalities or public institutions represented by said depositor. Said assets so pledged to be held by the designated Trustee as security for the repayment of the said deposit to the order of the said depositor but not as a guar-

antee of the lawful acts of said depositor in his official capacity."

These defendants further answering say that the deposit of the securities of The City National Bank of Herrin with the defendant, Continental Illinois Bank and Trust Company, for the purpose of securing the deposit of the public money of the defendant, City of Marion, Illinois, was made by the officers of said The City National Bank of Herrin pursuant to authority expressly granted by the Board of Directors of said Bank and that said deposit agreement, a copy of which is annexed to the bill of complaint herein and identified as "Exhibit A", was executed by R. A. Karr, then Vice-President of said The City National Bank of Herrin because of the illness of John Alexander, President of said Bank and his inability to perform the duties of the office of President of such Bank; these defendants further answering say that the pledge of said securities to secure the deposit of public money of the City of Marion in manner and form as was done was, in any event, an act within the apparent authority of the officers of said Bank by whom such deposit of securities with Continental Illinois Bank and Trust Company was made, and that these defendants were fully warranted in relying upon and did rely upon the authority of said officers to make and enter into such obligation upon the part of said Bank; further answering these defendants say that the pledge of its securities by The City National Bank of Herrin was thereafter and with knowledge of the facts fully ratified by the Board of Directors of said Bank.

47 These defendants deny that the delivery of said bonds and securities was a fraud upon the general creditors and depositors of said The City National Bank of Herrin, and deny that such delivery of such bonds and securities was without the powers of said Bank and the officers thereof or was an ultra vires act of said officers and of said Bank and was and is wholly void and of no force and effect; these defendants further deny that no title to or interest in or lien upon or lien against said bonds and securities, or any part thereof, was acquired by any of the defendants herein by the aforesaid delivery thereof to said Continental Illinois Bank & Trust Company and that none of said defendants have any title to or interest in or lien upon said bonds and securities; these defendants further answering say that they each have the right to have the bonds and securities of The City National Bank of Herrin deposited with Continental Illinois

Bank & Trust Company held and disposed of by Continental Illinois Bank & Trust Company for the uses and purposes in said depository agreement stated, and for the purpose of securing payment to the City of Marion of its public money deposited with said The City National Bank of Herrin; these defendants admit that the money of the City of Marion, Illinois deposited in said The City National Bank of Herrin, as aforesaid, was not at the times of such deposits, or at any other time, the money of the United States, but deny that complainant is entitled to the possession and custody thereof.

8. Answering the eighth paragraph of said bill, these defendants admit that the agreement annexed to the bill of complaint as Exhibit "A" contains the provisions as are in said paragraph of said bill alleged; they admit that the bonds and securities deposited with the defendant, the Continental Illinois Bank & Trust Company, are negotiable in character and are transferable by delivery. These defendants, however, say that they have no information as to the number of depositors or creditors of said The City National Bank of Herrin, or as to the amount of their deposits.

9. Answering the ninth and tenth paragraphs of the said bill, these defendants admit that the complainant did, on the 11th day of November, 1931, send to these defendants, and these defendants further admit that they are advised that the complainant did at the same time send to the defendant,
48 Continental Illinois Bank & Trust Company, a letter in form the same as the copy thereof annexed to the bill of complaint as Exhibit "B", but these defendants say that complainant was wholly without any right or authority to disaffirm or repudiate the pledge of the bonds and securities hereinabove mentioned by The City National Bank of Herrin with Continental Illinois Bank & Trust Company for the purpose of securing the deposits of the public money of the defendant, City of Marion, in said The City National Bank of Herrin, and that such letter and attempted repudiation by complainant however made was wholly void and of no effect.

10. Answering the eleventh paragraph of the said bill, these defendants say that The Fidelity and Casualty Company of New York is surety on the official bond of Ray Carroll, as City Treasurer, to the City of Marion, Illinois.

11. As defenses of law in this case these defendants say:

(a) That The City National Bank of Herrin had power and authority to pledge its bonds and securities, forming part

of its assets to secure the deposit with it of the public money of the defendant, City of Marion, Illinois, in manner and form as appears by the allegations in the bill of complaint in this case to have been done.

(b) It appears upon the face of the bill of complaint that The City National Bank of Herrin received the full benefit of the deposits of the public money of the defendant, City of Marion, Illinois, a political subdivision of the State of Illinois, a political subdivision of the State of Illinois, in said bank made by Ray Carroll, as City Treasurer of Marion, and that being true and the public money of the City of Marion having been deposited in said bank in reliance upon and because of the security afforded it by reason of the deposit of the bonds and securities of The City National Bank of Herrin in Continental Illinois Bank & Trust Company, complainant, as Receiver of The City National Bank of Herrin, should not be allowed to recover said bonds and securities except upon payment to the defendant, City of Marion, of the amount of its public money on deposit in said The City National Bank of Herrin.

49 (c) That the law of the State of Illinois permits banks located in such state to pledge securities by them owned to secure deposits of public money of political subdivisions of the State in manner as appears by the allegations of the bill of complaint herein to have been done, and that, therefore, The City National Bank of Herrin was authorized and empowered to secure the deposit of the public money of the defendant, City of Marion, with it in manner as was done; that the provisions of the Illinois statute in Paragraph Five of the bill of complaint referred to are not intended to and do not limit the power or authority of banks as to the manner in which they shall transact business or curtail powers otherwise existing, whether specifically granted by statute or implied by law, but the provisions of such statute are intended simply for the protection of the City Treasurer and to relieve him from the usual absolute duty to account for any funds of the City that might come into his hands by complying with the provisions of such statute; that such statute is not intended or designed as a method of escape for a bank from obligations it may have assumed or purported to assume because of non-compliance by a City Treasurer upon his part with the provisions of such statute in the making of a deposit of public money of the City.

(d) That the officers of The City National Bank of Herrin

were fully authorized by the resolution of the Board of Directors of said bank theretofore adopted to pledge the bank's securities with Continental Illinois Bank and Trust Company for the purposes of securing the deposits of the public money of the City of Marion; but that even if such resolution had not been so adopted such deposit of bonds so made by the officers of said bank would have been valid inasmuch as such an act done by the officers of said bank in the usual transaction of its business was one within their actual, or in any event, within their apparent authority as officers of said bank; that even if the action of said officers had not been specifically authorized the retention by said bank of the public money of the City of Marion deposited with it was of itself a ratification of such pledge.

50 (e) That inasmuch as The City National Bank of Herrin could not itself have disaffirmed the contract made by it pledging its bonds or securities as security for the deposit of the public money of the City of Marion, and could not itself have recovered its assets pledged thereunder, complainant, as Receiver of such Bank, cannot disaffirm such contract and recover the assets of the Bank pledged thereunder and, in any event, he could not repudiate such contract and at the same time retain its fruits, that is to say, the public money of the City of Marion on deposit with said Bank and secured by the pledge of said Bank's securities.

(f) That the defendant The Fidelity and Casualty Company of New York is entitled as fully to the benefit of the bonds and securities of The City National Bank of Herrin now deposited with the defendant, Continental Illinois Bank and Trust Company, as is the defendant, City of Marion, Illinois, and that in the event the defendant, The Fidelity and Casualty Company of New York, should be required to pay to the defendant, City of Marion, Illinois, the amount of public money of the defendant, City of Marion, on deposit in said The City National Bank of Herrin, then the defendant, The Fidelity and Casualty Company of New York is and should be fully subrogated to all of the rights of the defendant, City of Marion, Illinois, as against said bonds and securities of The City National Bank of Herrin deposited with the defendant, Continental Illinois Bank and Trust Company.

12. Wherefore, these defendants having fully answered the bill of complaint, deny that the complainant is entitled to the relief demanded, or any part thereof, and pray to be hence

dismissed with their reasonable charges in this behalf most wrongfully sustained.

CITY OF MARION, ILLINOIS and
THE FIDELITY AND CASUALTY COMPANY OF NEW YORK
By R. T. COOK (Signed)
Sgd—C. E. POPE
Sgd—H. F. DRIEMEYER
Their Solicitors.

51 Endorsed: * * (Caption) * * Answer of Defendants, City of Marion and The Fidelity and Casualty Company of New York. Filed Dec. 22, 1931. D. H. Reed, Clerk. Pope & Driemeyer, Attorneys and Counselors at Law, 24 North Main Street, East St. Louis, Illinois.

d Dec. 22. 52 And on the same day, to-wit: on the 22nd day of December, A. D. 1931, the following further proceedings were had in said Court in said Cause, and entered of record, to-wit:

53 * * (Caption) * *.

Tuesday, December 22nd, A. D. 1931.

Present: Honorable Fred L. Wham, Judge.

Now on this 22nd day of December, A. D. 1931, comes the plaintiff Ben Sneeden, as Receiver of The City National Bank of Herrin, by his attorneys Ferrell and Hay, and come also Defendants, City of Marion, Illinois, a municipal corporation, Continental Illinois Bank and Trust Company, a Corporation, the Fidelity and Casualty Company of New York, a Corporation and Ray C. Carroll, as Treasurer of the City of Marion, Illinois, by their attorneys, Pope & Driemeyer, Ralph Cook and Mr. Moyer, respectively. And now on motion of Ferrell and Hay, attorneys for the plaintiff herein, and by agreement of the parties hereto, the court being fully advised in the premises, it is ordered by the court that the said plaintiff be, and he is hereby granted leave to amend bill of complaint filed herein, by making Ray Carroll, City Treasurer of Marion, Illinois, party defendant, which said amendment is then and there effected.

And now comes the Continental Bank & Trust Company one of the defendants herein, and by leave of the court first had and obtained withdraws their motion to dismiss bill of complaint heretofore filed herein. And now upon due motion and by agreement of Counsel, it is ordered by the court that the answers of the defendants City of Marion and Fidelity Casualty Company heretofore filed herein be, and they are hereby extended to the bill of complaint as amended herein.

And now all of the said defendants having filed herein their respective answers to the bill of complaint and issues being joined, it is ordered by the Court that in accordance with agreement by and between the parties hereto, this cause be submitted on signed stipulation of facts, which is then and there filed and presented, and now this cause come on further for hearing upon the issues herein, and consideration of said signed stipulation of facts, after hearing the issues and said stipulation of facts and arguments of respective counsel hereto, It Is Ordered by the Court that said cause be, and the same is hereby taken under advisement and that the respective counsel hereto submit briefs for consideration of the court at the earliest possible moment.

54 And on the same day, to-wit: on the 22nd day of December, A. D. 1931, there was filed in open Court in said Cause, and presented to the Court, a Stipulation of Facts, which said Stipulation of Facts, was and is in words and figures, the following, to-wit: Filed Dec. 2 1931.

55 * * (Caption) * *

STIPULATION OF FACTS:

It Is Hereby Stipulated and Agreed by and between the complainant, Ben Sneeden, as Receiver of The City National Bank of Herrin, Illinois, and the defendants, City of Marion, Illinois, Continental Illinois Bank and Trust Company, Ray Carroll, as Treasurer of the City of Marion, Illinois, and The Fidelity and Casualty Company of New York, that this case shall be heard and disposed of by the Court upon the following agreed statement of facts and such other testimony as either party may offer and received by the Court upon the hearing of this cause.

1. The averments contained in Paragraphs One, Two, Three, Four and Five of the bill of complaint shall be taken as true, with the limitation that this admission shall not be understood to qualify in any manner the contention of the defendants therein as to their right, title or interest in and to the bonds and securities in Paragraph Three of the bill of complaint described.

56 2. Prior to August 25, 1931 Ray Carrol had been appointed Treasurer of the City of Marion. He was required as such Treasurer to execute bond with good and sufficient surety to be approved by the President of the Council of said City payable to said City and conditioned for the faithful performance of the duties of the office and the payment of all moneys received by him according to law and the ordinance of said City. Carroll applied to the defendant, The Fidelity and Casualty Company of New York, which was then and is now engaged in the surety business, to execute as surety his official bond as such Treasurer. The defendant, The Fidelity and Casualty Company of New York, agreed to execute as surety the official bond of said Carroll, as such Treasurer, provided said Carroll would procure a bank which would secure the deposit of the public money of the City of Marion by him made in said Bank by pledge of some of its assets which would be satisfactory to The Fidelity and Casualty Company of New York as collateral security therefor. There was then no bank in the City of Marion. Ray Carroll, as Treasurer, William Below, Finance Commissioner of the City of Marion, and an agent of The Fidelity and Casualty Company of New York, discussed with Joe P. Benson, Cashier of The City National Bank of Herrin, the question of that Bank securing the deposit of the public money of Marion in it by the pledge of its securities, and an agreement was made between said Benson and said Carroll, Below and the Agent of The Fidelity and Casualty Company of New York, that if said Carroll would deposit in said Bank the public money of the City of Marion coming into his hands as Treasurer, said Bank would deposit with Continental Illinois Bank and Trust Company the bonds and securities in

57 Paragraph Three of the bill of complaint described to be held by said Continental Illinois Bank and Trust Company for the purpose of securing the deposit of the public money of Marion. Mr. Benson stated to Mr. Carroll, Mr. Below and the agent of The Fidelity and Casualty Company

of New York that Continental Illinois Bank and Trust Company had a standard form of agreement used by it in accepting deposit with it of bonds or securities for the purpose of securing deposits in other banks. Mr. Benson thereupon advised R. A. Karr, Vice-President of The City National Bank of Herrin, of the arrangement he had made for accepting deposits of the public money of Marion, and Mr. Karr approved the arrangement made and did, with Mr. Benson, as Vice-President and Cashier, respectively, of The City National Bank of Herrin, execute an agreement, a true copy of which is annexed to the bill of complaint herein as "Exhibit A". Mr. Benson thereupon transmitted to Continental Illinois Bank and Trust Company the bonds and securities described in Paragraph Three of the bill of complaint with the executed copy of the document a copy of which is annexed to the bill of complaint and identified as "Exhibit A". After the arrangement had been made between Mr. Benson, Mr. Carroll, Mr. Below and Agent of The Fidelity and Casualty Company of New York hereinabove expressed, The Fidelity and Casualty Company of New York did execute the official bond of said Carroll, as City Treasurer, and a copy of such bond is annexed to this stipulation and is identified as "Exhibit A". R. A. Karr, as Vice-President, executed the document a copy of which is annexed to the bill of complaint as "Exhibit A" because of the absence of John Alexander,
President of the Bank, who resided in Murphysboro, due
58 to illness. The deposits of public moneys of the City of
Marion made in The City National Bank of Herrin by Ray Carroll, as Treasurer, were made by him pursuant to the arrangements and agreements hereinabove expressed. Mr. Benson informed the Directors of The City National Bank of Herrin of the arrangement which he had made and of the fact that the Bank's bonds had been pledged as security for the deposit of the public money of the City of Marion, and while no formal action was taken by the Board of Directors at a meeting of the Board, the matter was discussed at Board meetings and with the Directors individually and the various Directors acquiesced in the action taken. Mr. Benson, as Cashier of The City National Bank of Herrin, agreed with Carroll and Below that the Bank would pay the City of Marion interest on its public moneys on deposit at the rate of two per cent per annum payable monthly on average balances in excess of Five Thousand Dollars ($5000.00). The

City National Bank of Herrin did not execute and deliver to the City of Marion any bond to secure the deposit of the public money of the City of Marion in any form whatsoever. The deposit of the public money of the City of Marion made in The City National Bank of Herrin was on checking account and the City Treasurer drew checks against the deposit from time to time in the ordinary course of business, which were accepted and paid by the Bank.

3. The bonds described in Paragraph Three of the bill of complaint remain in the custody of Continental Illinois Bank and Trust Company, which continues to hold them subject to the terms and provisions of the document a copy of which is annexed to the bill of complaint and identified as "Exhibit A".

59 4. It is further stipulated and agreed that the document annexed hereto and identified as "Exhibit B" is a true copy of the minutes of a meeting of the Board of Directors of The City National Bank of Herrin held on June 13, 1930. It is further stipulated and agreed that Joe P. Benson, if called as a witness, would identify the document hereto annexed and identified as "Exhibit C" as a true copy of the resolution referred to in the last paragraph of said minutes.

5. The bond executed by The Fidelity and Casualty Company of New York and a copy of which is hereto annexed as Exhibit "A", while dated August 17th, 1931, was not delivered by The Fidelity and Casualty Company of New York to the City of Marion, Illinois until after the bonds and securities of The City National Bank of Herrin, described in paragraph Three (3) of the Bill of Complaint, had been actually deposited by The City National Bank of Herrin with Continental Illinois Bank and Trust Company for the purposes hereinabove mentioned.

6. The City National Bank of Herrin made a statement of its condition in the latter part of September, 1931, which was published. This was the only statement of condition that was published subsequent to July 31st, 1931. In that statement no reference was made to the fact that the bonds and securities, described in paragraph Three (3) of the Bill of Complaint, had been pledged to secure the deposit of the public money of the City of Marion or that other securities of the Bank had been pledged to secure other deposits. In the form of statement of its condition required to be pub-

lished by the Bank, no provision was made for a statement as to the existence of such pledges.

60 Dated—December 22nd, 1931,

BEN SNEEDEN, As Receiver of the City National Bank of Herrin

By (Signed) HOSEA V FERRELL &
(Signed) JOHN HAY
Its Attorneys

CITY OF MARION, ILLINOIS
By (Signed) R T COOK
Its Attorneys

CONTINENTAL ILLINOIS BANK AND TRUST COMPANY
By (Signed) MAYER, MEYER, AUSTRIAN & PLATT
Its Attorneys

RAY CARROLL, As Treasurer of the City of Marion,
By (Signed) R T COOK
His Attorneys

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK,
By POPE AND DRIEMEYER
Its Attorneys

61

No. 1405523

The Fidelity and Casualty Company of New York

Home Office, 80 Maiden Lane, New York City

Bonding Department, Hale Anderson, Superintendent in Charge

Know All Men by These Presents, that we, Ray C. Carroll, as Principal, and The Fidelity and Casualty Company of New York, as Surety, are held and firmly bound unto the City of Marion, in the penal sum of Twenty-Five Thousand Dollars ($25,000.00) lawful money of the United States, for the payment of which we bind ourselves, our heirs, executors and administrators, jointly, severally and firmly by these presents.

Sealed with our seals and dated this 17th day of August, A. D. 1931.

The Condition of the Above Obligation Is Such, that, whereas, the above bounden Ray C. Carroll, was, on the 17th day of August, A. D. 1931, duly elected (or appointed, as the

case may be) to the office of City Treasurer of the City of Marion. Now, if the said Ray C. Carroll, shall well, truly and faithfully discharge and perform the duties of the said office, and shall, at the expiration of his term of office, surrender the said office and pay over all moneys in his hands by him held by virtue of said office, and deliver all books, papers, furniture and appurtenances of said office to his legally qualified successor, or in case of his removal from said office or resignation thereof before the expiration of his term of office, shall surrender the same and all the appurtenances thereof, to the person appointed to receive the same, then this obligation shall be void; otherwise to remain in full force and effect.

Signed, sealed and delivered the day and your above written.

(Signed) RAY C. CARROLL
THE FIDELITY AND CASUALTY COMPANY OF NEW YORK
By (Signed) THORLEIF NARUP
Attorney.

(Seal)

62 The Fiedlity and Casualty Company of New York

The Pioneer Bonding Company of the United States

Bonding Department: Hale Anderson, Vice-President, in charge
92 Liberty Street, New York City

Know All Men by These Presents:

That The Fidelity and Casualty Company of New York has made, constituted, and appointed, and by these presents does make, constitute, and appoint Thorleif Narup, of Chicago Illinois its true and lawful attorney for it and in its name, place, and stead to execute on behalf of the said Company, as surety, bonds, undertakings, and contracts of suretyship to be given to all obligees provided that no bond or undertaking or contract of suretyship executed under this authority shall exceed in amount the sum of one hundred thousand dollars.

In Witness Whereof The Fidelity and Casualty Company of New York has caused its official seal to be hereunto affixed, and these presents to be signed by one of its assistant secre-

taries and attested by one of its assistant secretaries this 18th day of April, 1928.

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK
By ALBERT BRUNS
Assistant Secretary.

Attest:
WM. P. HARVEY
Assistant Secretary.

Bond 1245, 10M
(30061424)

63 (Back)

State of New York, }
County of New York, } ss.:

WM. P. HARVEY, being duly sworn, deposes and says:

That he is an assistant secretary of The Fidelity and Casualty Company of New York, the corporation which is described in and which executed the instrument overleaf; that he knows the corporate seal of the said corporation; that the seal affixed to the instrument overleaf is the corporate seal of The Fidelity and Casualty Company of New York, and was thereto affixed by order and authority of the board of directors of the said Company; that he signed his name thereto by like order and authority; that he is acquainted with Albert Bruns, and knows him to be an assistant secretary of the said Company; that the signature of the said Albert Bruns subscribed to the said instrument is in the genuine handwriting of the said Albert Bruns, and was thereto subscribed by order and authority of the said board of directors of the said Company; that the said Company is duly and legally incorporated under the laws of the State of New York, and has complied with and is now complying with the provisions of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds.

The deponent further states that the following is a true copy of an extract from the minutes of a meeting of the board of directors of the said Company held at its office in the City of New York on the 18th day of April, 1928, a quorum being present, and the resolutions contained in the said extract were unanimously adopted and are now in full force and effect:

"Resolved, That Robert J. Hillas, the president of the Company, be, and that he hereby is, and that Hale Anderson, a vice-president of the Company, be, and that he hereby is, authorized to execute powers of attorney qualifying the attorney named in the given power of attorney to execute in behalf of The Fidelity and Casualty Company of New York bonds, undertakings, and all contracts of suretyship; and that any vice-president, the vice-president and secretary, or any assistant secretary be, and that each of them hereby is, authorized to attest the execution of any such power of attorney, and to attach thereto the seal of the Company."

"Resolved, That either Albert Bruns or William P. Harvey, each an assistant secretary of the Company, be and that he hereby is authorized to executed alone powers of attorney qualifying the attorney named in the given power of attorney to execute in behalf of The Fidelity and Casualty Company of New York bonds, undertakings, and all contracts of suretyship, not exceeding one hundred thousand dollars in amount; and that any vice-president, the vice-president and secretary, or any assistant secretary be, and that each of them hereby is, authorized to attest the execution of any such power of attorney, and to attach hereto the seal of the Company."

WM. P. HARVEY
Assistant Secretary.

Sworn to before me this 18th day of April, 1928.

FLORENCE CARROLL
Commissioner of Deeds,
City of New York.

I, Frank B. Smedes, and assistant secretary of The Fidelity and Casualty Company of New York, do hereby certify that I have compared the copy of the power of attorney overleaf and the foregoing copy of the affidavit annexed to the said power of attorney with the originals now on file in the home office of the said Company, and that the same are correct transcripts therefrom and of the whole of the said originals, and that the said power of attorney has not been revoked and is now in full force and effect.

64 In testimony whereof I have hereunto set my hand and affixed the seal of the said Company this 17th day of August, in the year of one thousand nine hundred and Thirty-one.

FRANK B. SMEDES
Assistant Secretary.

State of Illinois } ss.:
County of Cook }

I, Cleo M. Riley, a Notary Public of Cook County, in the State of Illinois, do hereby certify that Thorleif Narup, Attorney of The Fidelity and Casualty Company of New York, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed, sealed and delivered said instrument, for and on behalf of The Fidelity and Casualty Company of New York for the uses and purposes therein set forth.

Given under my hand and notarial seal at my office in the City of Chicago, in said County, this 17th day of August, A. D. 1931.

(Signed) CLEO M. RILEY
Notary Public.

Bond, 1353, 2M*
(3103490)

65

June 13, 1930

The directors of the City National Bank met at the bank, Friday, June 13, 1930 at 4:00 P. M. Directors present were John Alexander, W. C. Alexander, R. A. Karr, A. J. Will and Joe P. Benson.

Moved by W. C. Alexander, seconded by A. J. Will that a form resolution authorizing the borrowing of funds from the First National Bank, St. Louis and the Continental Illinois Bank and Trust Company, Chicago, be approved. Carried.

Moved by W. C. Alexander, seconded by R. A. Karr that the cashier be authorized to sell $25,000.00 bonds and securities of the bank and apply the proceeds on the bank bills payable. Carrier.

The attached resolution relating to pledge of collateral for deposit of public funds and postal savings funds was adopted.

JOHN ALEXANDER,
Pres.
JOE. P. BENSON,
Cashier.

Copy

66 Copy

City National Bank
Herrin, Illinois

We, the undersigned, John Alexander, President and Joe P. Benson, Cashier, of the City National Bank of Herrin, Illinois, hereby certify that a regular monthly meeting of the Board of Directors of the said Bank held at the bank Friday, June 13, 1930, at 4:00 P. M., present, John Alexander, W. C. Alexander, R. A. Karr, A. J. Will and Joe P. Benson, the following resolution was adopted and spread upon the minutes:

Resolved that the President and Cashier of the City National Bank of Herrin, Illinois, be hereby empowered to set aside with any third party as trustee any of the unpledged assets of the said bank as security for a deposit in said bank of any funds so deposited by any school treasurer, city treasurer, township treasurer, state treasurer, postmaster depositing postal savings funds, or any receiver for any closed bank or other public institution in conformity to law to secure such deposit which belongs to any of the municipalities or public institutions represented by said depositor, said assets so pledged to be held by the designated trustee as security for the repayment of the said deposit to the order of the said depositor but not as a guarantee of the lawful acts of said depositor in his official capacity.

And that any previous action of the president and cashier of the bank in conformity of the above be hereby ratified and confirmed.

Witness our hands and seals and the seal of this bank this 13th day of June, 1930.

CITY NATIONAL BANK, HERRIN, ILLINOIS
JOHN ALEXANDER,
President.
JOE P. BENSON,
Cashier.

Endorsed: Filed Dec 22-1931 D. H. Reed, Clerk.

70 And on the same day, to-wit: on the 22nd day of December, A. D. 1931, the following further proceedings were had in said court in said Cause, and entered of record, to-wit:

71 * * (Caption) * *

Entered D
1931.

ORDER OF COURT.

Now on this 22d day of December, A. D. 1931, this cause comes on for hearing upon the bill of complaint and answer thereto, and upon written stipulation of facts, and arguments of counsel being presented to this Court, the Court takes this cause under advisement.

It is ordered, adjudged and decreed by the Court that the former temporary restraining order heretofore entered in this cause on November 13, 1931, ordering the defendants, City of Marion, Illinois, a municipal corporation, Continental Illinois Bank and Trust Company, a corporation, and the Fidelity and Casualty Company of New York, a corporation, from selling or disposing of any of the bonds and securities mentioned and described in said order, and which said temporary restraining order has been from time to time con-

72 tinued and extended in full force and effect by the various orders and decrees of this Court, be and the same is hereby continued and extended in full force and effect until the 31st day of December, A. D. 1931.

The reasons for the entering of this order extending the aforesaid former order and decree are that this cause has been heard by the Court, and the Court desires to take the same under advisement without rendering an immediate decision on the issues involved herein, and desires that counsel for the respective parties hereto may submit briefs upon the issues involved herein to aid the Court, and that the complainant may suffer grave, irreparable and immediate damage through the sale of said bonds and securities by said defendants while this Court has said cause under advisement, unless the aforesaid temporary restraining order is continued in full force and effect.

This order shall expire and is returnable on the 31st day of December, A. D. 1931, at the hour of 10 o'clock in the forenoon.

Approved and Ordered Entered at the hour of 10 o'clock in the forenoon of the 22 day of December, A. D. 1931.

(Signed) FRED L. WHAM
Presiding Judge.

73 Endorsed: * * (Caption) * * Order of Court Filed and Entered Dec. 22-1931 D. H. Reed, Clerk Law Offices of Ferrell and Hay, First National Bank Building, Marion, Illinois.

d Dec. 31. 74 And afterwards, to-wit: on the 31st day of December, A. D. 1931, the following further proceedings were had in said Court in said Cause, and entered of record, to-wit:

75 * * (Caption) * *

ORDER OF COURT.

Now on this, the 31st day of December, A. D. 1931, it is ordered, adjudged and decreed by the Court that the former temporary restraining order entered in this cause on November 13, A. D. 1931, ordering the defendants, City of Marion, Illinois, a municipal corporation, Continental Illinois Bank and Trust Company, a corporation, and the Fidelity and Casualty Company of New York, a corporation, from selling or disposing of any of the bonds and securities mentioned and described in said order, and which said temporary restraining order has been from time to time continued and extended in full force and effect by the various orders and decrees of this Court, be and the same is hereby continued and extended in full force and effect until the 9th day of January, A. D. 1932, at 10:00 o'clock in the forenoon.

76 The reasons for the entering of this order extending the aforesaid order and decree are that this cause has been heard by the Court and the same has been taken under advisement by it, and the Court desires that counsel for the respective parties hereto submit briefs upon the issues involved herein to aid the Court, and that the complainant may suffer grave, irreparable and immediate damage through the sale of said bonds and securities by said defendants while this Court has said cause under advisement, unless the aforesaid temporary restraining order is continued in full force and effect.

This order shall expire and is returnable on the 9th day of January, A. D. 1932, at the hour of 10:00 o'clock in the forenoon.

Approved and Ordered Entered at the hour of 10:00 o'clock in the forenoon of the 31st day of December, A. D. 1931.

(Signed) FRED L. WHAM
Presiding Judge.

77 Endorsed: * * (Caption) * * Order of Court. Filed and Entered 10:00 a. m. December 31-1931 D. H. Reed, Clerk. Law Offices of Ferrell and Hay, First National Bank Building, Marion, Illinois.

78 And afterwards, to-wit: on the 9th day of January, A. D. 1932, the following further proceedings were had in said court in said cause, and entered of record, to-wit: Entered Ja 1932.

79 * * (Caption) * *

ORDER OF COURT.

Now on this, the 9th day of January, A. D. 1932, it is ordered adjudged and decreed by the Court that the former temporary restraining order entered in this cause on November 13, A. D. 1931, ordering the defendants, City of Marion, Illinois, a municipal corporation, Continental Illinois Bank and Trust Company, a corporation, and the Fidelity and Casualty Company of New York, a corporation, from selling or disposing of any of the bonds and securities mentioned and described in said order, and which said temporary restraining order has been from time to time continued and extended in full force and effect by the various orders and decrees of this Court, be and the same is hereby continued
80 and extended in full force and effect until the 19th day of January, A. D. 1932, at 10:00 o'clock in the forenoon.

The reasons for the entering of this order extending the aforesaid order and decree are that this cause has been heard by the Court and the same has been taken under advisement by it, and the Court desires that counsel for the respective parties hereto submit briefs upon the issues involved herein to aid the Court, and that the complainant may suffer grave, irreparable and immediate damage through the sale of said bonds and securities by said defendants while this Court has said cause under advisement, unless the aforesaid temporary restraining order is continued in full force and effect.

This order shall expire and is returnable on the 19th day of January, A. D. 1932, at the hour of 10:00 o'clock in the forenoon.

Approved and Ordered Entered at the hour of 10:00 o'clock in the forenoon of the 9th day of January, A. D. 1932.

(Signed) FRED L. WHAM
Presiding Judge.

81 Endorsed: * * (Caption) * * Order of Court Filed January 9, 1932 D. H. Reed, Clerk Law Offices of Ferrell and Hay First National Bank Building, Marion, Illinois.

Jan. 19. 82 And afterwards, to-wit: on the 19th day of January, A. D. 1932, the following further proceedings were had in said Court in said Cause, and entered of record to-wit:

83 * * (Caption) * *

ORDER OF COURT.

Now on this, the 19th day of January, A. D. 1932, it is ordered, adjudged and decreed by the Court that the former temporary restraining order entered in this cause on November 13, A. D. 1931, ordering the defendants, City of Marion, Illinois, a municipal corporation, Continental Illinois Bank and Trust Company, a corporation, and the Fidelity and Casualty Company of New York, a corporation, from selling or disposing of any of the bonds and securities mentioned and described in said order, and which said temporary restraining order has been from time to time continued and extended in full force and effect by the various orders and decrees of this Court, be and the same is hereby continued and extended in full force and effect until the 29th day of January, A. D. 1932, at 10:00 o'clock in the forenoon.

The reasons for the entering of this order extending the aforesaid order and decree are that this cause has been heard by the Court and the same has been taken under advisement by it, and the Court desires that counsel for the respective parties hereto submit briefs upon the issues involved herein to aid the Court, and that the complainant may suffer
84 grave, irreparable and immediate damage through the sale of said bonds and securities by said defendants whille this Court has said cause under advisement, unless the aforesaid temporary restraining order is continued in full force and effect.

This order shall expire and is returnable on the 29th day of January, A. D. 1932, at the hour of 10:00 o'clock in the forenoon.

Approved and Ordered Entered at the hour of 10:00 o'clock in the forenoon of the 19th day of January, A. D. 1932.

Signed—Fred L. Wham
Presiding Judge.

Endorsed: * * (Caption) * * Order of Court. Filed Jan 19 1932 D. H. Reed, Clerk. Law Offices of Ferrell and Hay, First National Bank Building, Marion, Illinois.

85 And afterwards, to-wit: on the 29th day of January A. D. 1932, the following further proceedings were had in said Court in said Cause, and entered of record, to-wit: Entered J 1932.

86 * * * (Caption) * *

ORDER OF COURT.

Now on this, the 29th day of January, A. D. 1932, it is ordered, adjudged and decreed by the Court that the former temporary restraining order entered in this cause on November 13, 1931, ordering the defendants, City of Marion, Illinois, a municipal corporation, Continental Illinois Bank and Trust Company, a corporation, and the Fidelity and Casualty Company of New York, a corporation, from selling or disposing of any of the bonds and securities mentioned and described in said order, and which said temporary restraining order has been from time to time continued and extended in full force and effect by the various orders and decrees of this Court, be, and the same is hereby continued and extended in full force and effect until the 6th day of February, A. D. 1932, at 10:00 o'clock in the forenoon.

The reasons for the entering of this order extending the aforesaid order and decree are that this cause has been heard by the Court and the same has been taken under advisement by it, and the Court desires that counsel for the respective parties hereto submit briefs upon the issues involved herein to aid the Court, and that the complainant may suffer grave, irreparable and immediate damage through the sale of

87 said bonds and securities by said defendants while this Court has said cause under advisement, unless the aforesaid temporary restraining order is continued in full force and effect.

This order shall expire and is returnable on the 6th day of February, A. D. 1932, at the hour of 10:00 o'clock in the forenoon.

Approved and Ordered Entered at the hour of 10:00 o'clock in the forenoon of the 29th day of January, A. D. 1932.

Signed—FRED L. WHAM
Presiding Judge.

Endorsed: * * (Caption) * * Order of Court. Filed Jan. 29-1932 D. H. Reed, Clerk. U. S. Dist. Court. Law Offices of Ferrell and Hay, First National Bank Building, Marion, Illinois.

Fd Feb. 6. 88 And afterwards, to-wit: on the 6th day of February, A. D. 1932, the following further proceedings were had in said Court in said Cause, and entered of Record, to-wit:

89 * * (Caption) * *

ORDER OF COURT.

Now on this, the 6th day of February, A. D. 1932, it is ordered, adjudged and decreed by the Court that the former temporary restraining order entered in this cause on November 13, 1931, ordering the defendants, City of Marion, Illinois, a municipal corporation, Continental Illinois Bank and Trust Company, a corporation, and the Fidelity and Casualty Company of New York, a corporation, from selling or disposing of any of the bonds and securities mentioned and described in said order, and which said temporary restraining order has been from time to time continued and extended in full force and effect by the various orders and decrees of this Court, be and the same is hereby continued and extended in full force and effect until the 16th day of February, A. D. 1932, at 10:00 o'clock in the forenoon.

The reasons for the entering of this order extending the aforesaid order and decree are that this cause has been heard by the Court and the same has been taken under advisement by it, and the Court desires that counsel for the respective parties hereto submit briefs upon the issues involved herein to aid the Court, and that the complainant may suffer
90 grave, irreparable and immediate damage through the sale of said bonds and securities by said defendants while this Court has said cause under advisement, unless the aforesaid temporary restraining order is continued in full force and effect.

This order shall expire and is returnable on the 16th day of February, A. D. 1932, at the hour of 10:00 o'clock in the forenoon.

Approved and Ordered Entered at the hour of 10:00 o'clock in the forenoon of the 6th day of February, A. D. 1932.

Signed—FRED L. WHAM
Presiding Judge.

Endorsed: * * (Caption) * * Order of Court. Filed Feb. 6-1932 D. H. Reed, Clerk. Law Offices of Ferrell and Hay First National Bank Bldg., Marion, Illinois.

91 And afterwards, to-wit: on the 16th day of February, A. D. 1932, the following further proceedings were had in said Court in said Cause, and entered of record to-wit: Entered Fe 1932.

92 * * (Caption) * *

ORDER OF COURT.

Now on this, the 16th day of February, A. D. 1932, it is ordered, adjudged and decreed by the Court that the former temporary restraining order entered in this cause on November 13, 1931, ordering the defendants, City of Marion, Illinois, a municipal corporation, Continental Illinois Bank and Trust Company, a corporation, and the Fidelity and Casualty Company of New York, a corporation, from selling or disposing of any of the bonds and securities mentioned and described in said order, and which said temporary restraining order has been from time to time continued and extended in full force and effect by the various orders and decrees of this Court, be and the same is hereby continued and extended in full force and effect until the 26th day of February, A. D. 1932, at 10:00 o'clock in the forenoon.

The reasons for the entering of this order extending the aforesaid order and decree are that this cause has been heard by the Court and the same has been taken under advisement by it, and the Court desires that counsel for the respective parties hereto submit briefs upon the issues involved herein to aid the Court, and that the complainant may suffer
93 grave, irreparable and immediate damage through the sale of said bonds and securities by said defendants while this Court has said cause under advisement, unless the aforesaid temporary restraining order is continued in full force and effect.

This order shall expire and is returnable on the 26th day of February, A. D. 1932, at the hour of 10:00 o'clock in the forenoon.

Approved and Ordered Entered at the hour of 10:00 o'clock in the forenoon of the 16th day of February, A. D. 1932.

Signed—Fred L. Wham
Presiding Judge.

Endorsed: * * (Caption) * * Order of Court. Filed Feb 16 1932 D. H. Reed, Clerk. Law Offices of Ferrell and Hay First National Bank Bldg., Marion, Illinois.

Filed Feb. 26, 32.

94 And afterwards, to-wit: on the 26th day of February, A. D. 1932, the following further proceedings were had in said Court in said Cause, and entered of record, to-wit:

95 * * (Caption) * *

ORDER OF COURT.

Now on this, the 26th day of February, A. D. 1932, it is ordered, adjudged and decreed by the Court that the former temporary restraining order entered in this cause on November 13, 1931, ordering the defendants, City of Marion, Illinois, a municipal corporation, Continental Illinois Bank and Trust Company, a corporation, and the Fidelity and Casualty Company of New York, a corporation, from selling or disposing of any of the bonds and securities mentioned and described in said order, and which said temporary restraining order has been from time to time continued and extended in full force and effect by the various orders and decrees of this Court, be and the same is hereby continued and extended in full force and effect until the 7th day of March, A. D. 1932, at 10:00 o'clock in the forenoon.

The reasons for the entering of this order extending the aforesaid order and decree are that this cause has been heard by the Court and the same has been taken under advisement by it, and the Court desires that counsel for the respective parties hereto submit briefs upon the issues involved herein

96 to aid the Court, and that the complainant may suffer grave, irreparable and immediate damage through the sale of said bonds and securities by said defendants while this Court has said cause under advisement, unless the aforesaid temporary restraining order is continued in full force and effect.

This order shall expire and is returnable on the 7th day of March, A. D. 1932, at the hour of 10:00 o'clock in the forenoon.

Approved and Ordered Entered at the hour of 10:00 o'clock in the forenoon of the 26th day of February, A. D. 1932.

Signed—FRED L. WHAM
Presiding Judge.

Endorsed: * * (Caption) * * Order of Court. Entered February 26-1932 D. H. Reed, Clerk. Law Offices of Ferrell and Hay First National Bank Bldg., Marion, Illinois.

97 And on the 7th day of March, A. D. 1932, the following further proceedings were had in said Court in said Cause, and entered of record, to-wit: Entered M. 7, 1932.

98 * * (Caption) * *

ORDER OF COURT.

Now on this, the 7th day of March, A. D. 1932, it is ordered, adjudged and decreed by the Court that the former temporary restraining order entered in this cause on November 13, 1931, ordering the defendants, City of Marion, Illinois, a municipal corporation, Continental Illinois Bank and Trust Company, a corporation, and the Fidelity and Casualty Company of New York, a corporation, from selling or disposing of any of the bonds and securities mentioned and described in said order, and which said temporary restraining order has been from time to time continued and extended in full force and effect by the various orders and decrees of this Court, be and the same is hereby continued and extended in full force and effect until the 17th day of March, A. D. 1932, at 10:00 o'clock in the forenoon.

The reasons for the entering of this order extending the aforesaid order and decree are that this cause has been heard by the Court and the same has been taken under advisement by it, and the Court desires that counsel for the respective parties hereto submit briefs upon the issues involved herein to aid the Court, and that the complainant may suffer grave, irreparable and immediate damage through
99 the sale of said bonds and securities by said defendants while this Court has said cause under advisement, unless the aforesaid temporary restraining order is continued in full force and effect.

This order shall expire and is returnable on the 17th day of March, A. D. 1932, at the hour of 10:00 o'clock in the forenoon.

Approved and Ordered Entered at the hour of 10:00 o'clock in the forenoon of the 7th day of March, A. D. 1932.

Signed—FRED L. WHAM
Presiding Judge.

Endorsed: * * (Caption) * * Order of Court. Ent Mareh 7-1932 D. H. Reed, Clerk. Law Offices of Ferrell and Hay First National Bank Building Marion, Illinois.

ed March 1932.

100 And afterwards, to-wit: on the 17th day of March, A. D. 1932, the following further proceedings were had in said court in said Cause, and entered of record to-wit:

101 • • (Caption) • •

ORDER OF COURT.

Now on this, the 17th day of March, A. D. 1932, it is ordered, adjudged and decreed by the Court that the former temporary restraining order entered in this cause on November 13, 1931, ordering the defendants, City of Marion, Illinois, a municipal corporation, Continental Illinois Bank and Trust Company, a corporation, and the Fidelity and Casualty Company of New York, a corporation, from selling or disposing of any of the bonds and securities mentioned and described in said order, and which said temporary restraining order has been from time to time continued and extended in full force and effect by the various orders and decrees of this Court, be and the same is hereby continued and extended in full force and effect until the 26th day of March, A. D. 1932, at 10:00 o'clock in the forenoon.

The reasons for the entering of this order extending the aforesaid order and decree are that this cause has been heard by the Court and the same has been taken under advisement by it, and the Court desires that counsel for the respective parties hereto submit briefs upon the issues involved herein to aid the Court, and that the complainant may suffer grave, irreparable and immediate damage through the sale of

102 said bonds and securities by said defendants while this Court has said cause under advisement, unless the aforesaid temporary restraining order is continued in full force and effect.

This order shall expire and is returnable on the 26th day of March, A. D. 1932, at the hour of 10:00 o'clock in the forenoon.

Approved and Ordered Entered at the hour of 10:00 o'clock in the forenoon of the 17th day of March, A. D. 1932.

Signed—FRED L. WHAM
Presiding Judge.

Endorsed: • • (Caption) • • Order of Court. Ent March 17-1932 D. H. Reed, Clerk. Law Offices of Ferrell and Hay First National Bank Building Marion, Illinois.

103 And afterwards, to-wit: on the 21st day of March, A. D. 1932, there was filed in the office of the Clerk of said Court in said Cause, and entered of record therein, Memoranda Opinion of the Court, which said Memoranda was and is in words and figures, the following, to-wit:

104 * * (Caption) * *

Wham, J.

By his bill the plaintiff, receiver of The City National Bank of Herrin, seeks to have the delivery and pledge of certain bonds by said bank to secure a deposit prior to the appointment of the receiver, of funds of the City of Marion, Illinois, by Ray C. Carroll, as City Treasurer, held an illegal and ultra vires act on the part of said bank and its officers; to have the defendants enjoined from disposing of said bonds and to have the same returned to the plaintiff. Plaintiff alleges that the pledge of assets of the bank to secure a deposit was not only beyond the power of the bank but was against public policy and constituted a fraud upon the bank's other creditors and depositors, and, further, that the making of this pledge by the officers was not authorized by the Board of Directors. The defendants by their joint answer deny that the plaintiff is entitled to the return of said bonds and deny that the pledge of said bonds was ultra vires, illegal and void; deny that such act was against public policy and a fraud on the other creditors and depositors of the bank and say that the funds so deposited were public moneys for the securing of which the said bank had a lawful right to pledge a portion of its assets, and that the officers so doing were authorized by the Board of Directors so to do, and their
105 acts were subsequently approved and acquiesced in by the Board. Upon application of the plaintiff, a temporary restraining order was issued restraining disposition of said bonds, and by agreement of the parties the entire matter was submitted to the court upon stipulation of facts for a determination of the merits of the case without a separate hearing upon plaintiff's application for preliminary injunction.

No evidence was taken in the case, but all the facts were stipulated in writing from which written stipulation the following findings of fact are made:

1. The plaintiff became the duly qualified and acting receiver of The City National Bank of Herrin, a national bank

located in the City of Herrin, Williamson County, Illinois, on October 2, 1931; that the City of Marion, Williamson County, Illinois, is a municipal corporation; that the Continental Illinois Bank and Trust Company is a banking association organized and existing under the laws of the State of Illinois and is located in the City of Chicago and the Fidelity and Casualty Company of New York is a corporation duly licensed to do business in the State of Illinois.

2. The plaintiff, Ben Sneeden, as receiver of The City National Bank of Herrin, is engaged in winding up the affairs of said bank; that said bank failed to open for business on October 21, 1931, and has since remained closed and suspended; that prior to the suspension of said bank it owned and held certain bonds described in paragraph three of the bill of complaint of a total par value of $21,000.00.

3. On August 25, 1931, one Ray C. Carroll, the City Treasurer of the City of Marion, Illinois, deposited in said The City National Bank of Herrin funds of said City of Marion in his name as city treasurer, and on October 21, 1931, the date of the closing of said bank, said Ray C. Carroll as
106 City Treasurer of the City of Marion, Illinois, had funds of said city on deposit in said bank in the sum of $16,430.00. The City of Marion, Illinois, before and during all the times aforesaid had adopted and its affairs were being administered under the "Commission Form of Government" as provided by the statutory laws of the State of Illinois.

4. Ray C. Carroll, to qualify under the law as treasurer of the City of Marion, was required to give a bond with good and sufficient surety conditioned for the faithful performance of the duties of the office and the payment of all moneys received by him according to the law and ordinances of said city; that he applied to the Fidelity and Casualty Company of New York to execute said bond as surety and that company agreed to do so provided Carroll would procure a bank which would secure the deposit of the public money of the City of Marion by pledge of some of its assets satisfactory to said surety company; that there was then no bank in the City of Marion; that said Carroll, as treasurer, with William Below, finance commissioner of the City of Marion, and an agent of the Fidelity and Casualty Company of New York, made and entered into an agreement with Joe P. Benson, cashier of The City National Bank of Herrin, that if said Carroll would deposit in said bank the public money of the City of Marion coming into his hands as treasurer, said bank

would deposit with the Continental Illinois Bank and Trust Company the bonds described in paragraph three of the bill of complaint to be held by said Continental Illinois Bank and Trust Company for the purpose of securing the safekeeping and prompt payment of the public money of the City of Marion deposited with said bank; that thereafter the said agreement was executed on behalf of The City National Bank of Herrin by R. A. Karr, vice-president of said bank, the
107 president being out of the city by reason of illness, and Joe P. Benson as cashier, and was transmitted by Mr. Benson to the Continental Illinois Bank and Trust Company with the bonds and securities described in paragraph three of the bill, and the agreement and bonds were received and the trust was accepted by said Continental Illinois Bank and Trust Company; that thereafter the Fidelity and Casualty Company of New York by reason of and on the strength of the deposit of the city's funds being thus secured, executed the official bond of said Carroll as city treasurer; pursuant to said agreement Ray C. Carroll as treasurer deposited the public moneys of the City of Marion in The City National Bank of Herrin.

5. The bonds described in paragraph three of the bill of complaint are now in the custody of the Continental Illinois Bank and Trust Company which holds them subject to the terms and provisions of the said depositary agreement.

6. Mr. Benson, as cashier of The City National Bank of Herrin, with said Below, finance commissioner, agreed that the bank would pay the City of Marion interest on its public moneys on deposit at the rate of two per cent per annum, payable monthly on average balances in excess of $5,000.00. The City National Bank of Herrin did not execute and deliver to the City of Marion any bond to secure the said deposit in any form whatsoever. The said deposit was on checking account and the city treasurer drew checks against the deposit from time to time in the ordinary course of business which were accepted and paid by the bank.

7. Mr. Benson informed the directors of The City National Bank of Herrin of the arrangement with Mr. Carroll as treasurer of the City of Marion and that the said securities belonging to the bank had been pledged as security for the deposit of the public money of the City of Marion.
108 The matter was discussed at a meeting of the Board of Directors and while no formal action was taken by the Board of Directors, the action taken was acquiesced in by the various directors individually.

8. On June 13, 1930, the Board of Directors of The City National Bank of Herrin at a regular monthly meeting of the Board adopted a resolution empowering the president and the cashier of the bank "to set aside with any third party as trustee any of the unpledged assets of the bank as security for a deposit in said bank of any funds so deposited by any school treasurer, city treasurer, township treasurer, state treasurer, postmaster depositing postal savings funds, or any receiver for any closed bank or other public institution in conformity to law, to secure such deposit which belongs to any of the municipalities or institutions represented by said depositor, said assets so pledged to be held by the designated trustee as security for the repayment of the said deposit to the order of the said depositor but not as a guarantee of the lawful acts of said depositor in his official capacity. And that any previous action of the president and cashier of the bank in conformity of the above be hereby ratified and confirmed."

9. The City National Bank of Herrin published a statement of its condition the latter part of September 1931, being the only statement of condition published subsequent to July 31, 1931, and therein made no reference to the fact that the bonds and securities described in paragraph three of the bill of complaint had been pledged to secure the deposit of the public money of the City of Marion or that other securities of the bank had been pledged to secure other deposits. In the form of statement of its condition required and published by the bank no provision was made for a statement as to the existence of such pledges.

109 10. No facts appear indicating bad faith, actual fraud or contemplation of the bank's insolvency at the time the pledge was made on August 28, 1931, on the part of the officers of the bank or of any other party to the transaction and I find there was none.

CONCLUSIONS OF LAW.

1. The City National Bank of Herrin had lawful power under the law of Illinois and of the United States at and during the time here in question to pledge its assets consisting of the bonds described in paragraph three of the bill of complaint to secure the general deposit of the public funds of the City of Marion and the transaction by which it did so

was lawful and not ultra vires and void and was not fraudulent as to other creditors and depositors in the bank.

2. The agreement entered into between said bank by and through its vice-president and cashier and Ray C. Carroll as treasurer of the City of Marion whereby the bank agreed to deposit with the Continental Illinois Bank and Trust Company the bonds described in paragraph three of the bill of complaint as security for the public funds of the City of Marion deposited in The City National Bank of Herrin was a lawful agreement, and the agreement in writing dated August 28, 1931, executed by said officers of the bank, and the acceptance, in writing, of the trust with the bonds deposited therewith, was a lawful agreement and transaction.

3. The transaction was authorized and with full knowledge thereof acquiesced in by the Board of Directors of said bank and became and was the binding act of the bank.

4. The receiver of The City National Bank of Herrin is not entitled to recover the bonds so pledged without payment of the deposit in full which the bonds were pledged to secure, and is not entitled to an injunction restraining the enforcement and execution of the terms of the agreement entered into on the 28th day of August, 1931, under which the said bonds were pledged with the Continental Illinois Bank and Trust Company of Chicago, Illinois as security for said deposit.

5. The plaintiff's bill should be dismissed for want of equity at the cost of the plaintiff and the temproary restraining order entered herein should be dissolved.

OPINION.

Was the agreement entered into by The City National Bank of Herrin by which it agreed to pledge a portion of its assets to secure the public moneys of the City of Marion, and the pledge of said assets pursuant to said agreement, under the circumstances there existing, beyond its powers, and void?

By Section 90, Title 12, U. S. C., (R. S. 5153, derived from Act of June 5, 1864; 13 Stat. 113), national banks, when designated by the secretary of the treasury, are made depositaries of public money and financial agents of the United States Government and are required to give satisfactory security for the faithful performance of such duties by deposit

of United States bonds and otherwise. To this section was added by way of amendment on June 25, 1930, the following paragraph:

> "Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safe-keeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State."

The statutes of the State of Illinois controlling cities under the so-called "Commission Form of Government",
111 as was the City of Marion at the time of the deposit and agreement here in question, provided that the city treasurer should deposit the money received by him as treasurer in a bank in the city to be selected by the president of the council, the commissioner of accounts and finance and the treasurer or any two of them, and that before such deposits were made in the bank so chosen, the bank should be required to enter into an obligation to pay interest on monthly balances and to execute a good and sufficient bond with sureties to be approved by the president of the council conditioned that such bank safely keep and account for and pay over said money. Chapter 24, Section 316, Smith-Hurd Revised Statutes of Illinois, page 404.

There was no bank in the City of Marion on August 28, 1931 when the deposit and agreement here in question were made and it was impossible for the city treasurer of that city to comply with the statute requiring him to deposit city funds in a designated depositary in the city. The only statute directing the disposition of the public money in his hands being inapplicable, the city treasurer was under the responsibility of finding for himself a depositary for the city funds with the safest security possible. He had to keep the money available for use as the city needed it and was under personal obligation to keep it safely and account for it. He was required to give a bond guaranteeing that he would do so. Under the circumstances it would seem that he was acting within the law when he deposited the money in The City National Bank of Herrin and required a pledge of a sufficient portion of the bank's assets to assure the return of the deposit, if the bank was authorized to give such security. The
112 amendment to Section 90, Title 12, U. S. C. specifically authorized The City National Bank of Herrin to accept

public funds of the City of Marion as deposits and pledge assets to secure such deposits if the law in Illinois authorized banks within the State to give such security under similar circumstances.

No statute of the State of Illinois expressly authorizes or prohibits the giving of such security to secure public funds. Whether the law of Illinois authorizes banks within the State to give security must be determined from its banking act, the decisions of its courts, and its legislative policy as shown by its statutes touching or related to the subject.

The banking act of Illinois provides that "it shall be lawful to form banks and banking associations, as hereinafter provided, for the purpose of discount and deposit, buying and selling exchange and doing a general banking business, excepting the issuing of bills to circulate as money; and such banks or banking associations shall have the power to loan money on personal and real estate security, and to accept and execute trusts." (Sec. 1, Chap. 16½ Smith-Hurd Illinois Rev. Stat.) The act does not further define, express or limit the power of a bank with reference to giving security for deposits of public funds.

The Illinois legislature has recognized the power of banks doing business under the laws of Illinois to secure the deposit of public funds by pledge of assets. As illustrative of such legislative recognition Sec. 29 of Chap. 130 of Smith-Hurd's Rev. Stat., authorizes the deposit of securities by banks designated as depositaries to protect State moneys. It is reasonable to conclude that if banks have the power, under the banking act of Illinois which is thus recognized by the legislature, the power also extends to the giving of similar security for any public funds of the State or political subdivision of the State.

The legislative policy thus expressed negatives the thought that the pledge by a bank of its assets to secure public
113 deposits is contrary to the public policy of the State of Illinois or should be looked upon as a fraud upon the other depositors. In the same way the 1930 amendment to Sec. 90, Title 12 negatives the thought that the pledge of assets to secure deposits of public funds of a State or political supervision thereof is contrary to public policy relating to national banks or operates as a fraud upon general depositors.

While there is no published decision in the State of Illinois which deals directly with the power of banks to pledge

their assets to secure deposits of public funds, a decision of the Supreme Court in the case of *Ward* v. *Johnson*, 95 Ill. 215, is generally recognized by the courts as laying down the broad rule that banks have the power to pledge their assets to secure deposits of any character whatsoever. Its citation in the following cases may be noted: *Williams* v. *Earhart*, 273 Pac. 728, (Ariz. 1929); *First Amer. Bank & Trust Co. et al.* v. *Town of Palm Beach*, 117 So. 900 (Fla. 1928); *U. S. Fidelity & Guar. Co.* v. *Bassfield*, 114 So. 26, (Miss. 1927); *Page Trust Co.* v. *Rose*, 135 S. E. 795, (N. C. 1926); *Cameron* v. *Christy*, 133 Atl. 551 (Pa. 1926); *Grigsby* v. *Peoples Bank*, 11 S. W. 2d, 673 (Tenn. 1928); *Pixton* v. *Perry*, 269 Pac. 144, (Utah 1928); *Schumacher* v. *Eastern Bank & Trust Co.*, 52 Fed. 2d 925, 4 CCA (U. S. 1931).

Though a careful reading of the facts dealt with in *Ward* v. *Johnson, supra,* may bring one to the conclusion that the pledge of assets there held valid was given to secure loans and deposits in the nature of loans, the broader principle therein expressed has never been questioned in Illinois by any decision or by any legislative enactment. Unquestionably, the weight of authorities in other jurisdictions, as will be hereinafter shown, supports the rule that banks, in the absence
114 of specific statutory limitation, have the power to secure the deposit of public funds by a pledge of assets of the bank.

A careful appraisal of the foregoing considerations, in my judgment, warrants the conclusion that banks in Illinois are authorized by its laws to accept a deposit of public funds and pledge assets as security, and, under the circumstances disclosed in this case, any bank in the State would have been authoribed by the laws of Illinois to accept the funds of the City of Marion and secure the same by such pledge. It follows that The City National Bank of Herrin had specific authority under Sec. 90, Title 12, U. S. C. as amended, to accept the deposit of the public funds of the City of Marion and pledge the bonds here in question as security.

It would further appear from a study of the National Banking Act, the statutes of the United States relating to security required of national banks for deposits of moneys of the United States and the trend of the decisions relating to the powers of banks that national banks have always had the power to give security for deposits of public funds by a pledge of assets.

The powers of a national bank are conferred by Rev. Stat.

Sec. 5136 (Title 12 U. S. Code, Sec. 24), which provides that such a bank shall have power to adopt and use a corporate seal, to have succession for ninety-nine years, to make contracts, to sue and be sued, to elect or appoint directors and officers, to prescribe by-laws, and—

> "*Seventh.* To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this chapter."

115 While not expressly given by the statute, the power of national banks to pledge their assets to secure loans has been universally recognized. This rule has been oftentimes held to include deposits in the nature of loans, the courts having regard to the substance of the transaction rather than its form. But that there are fundamental differences in the character of the indebtedness created by a loan and that created by a general deposit has been noted. Such differences are well stated by the court in *Schumacher* v. *Eastern Bank and Trust Co.*, 52 Fed. 2d 925 (CCA 4). These recognized differences between loans and general deposits have resulted in a conflict in the authorities with reference to the power of a bank to pledge its assets to assure general deposits. While we are not here directly concerned with the power of banks to secure private deposits, a distinction has generally been drawn, in considering this problem, between the power of banks to secure a private deposit and the power to secure a deposit of public funds by a pledge of assets.

The power of banks to pledge assets to secure deposits of public funds has often been recognized by legislative bodies which have apparently assumed that banks have such power and have made use of it for the protection and safe-keeping of public funds.

That the Congress of the United States early recognized that national banks had the power to pledge their assets to secure deposits of funds belonging to the United States is illustrated by Sec. 90, Title 12, U. S. C., requiring national banks, when designated by the secretary of the treasury as depositaries of public money, to give security therefor by deposit or pledge of their assets. By this section the Congress

did not confer power to pledge assets for security of deposits of public money of the United States, but thereby recognized and utilized that power in the bank under the act by
116 which it was created. (1915) 30 Op. Att'y Gen. 341.

Other statutes of the United States have similarly recognized and utilized the power of national banks to pledge their assets as security for the public funds of the United States. (Sections 192, 332 and 701, Title 12, and Section 759, Title 39 U. S. C.).

Since the Congress has recognized the power of national banks to pledge their assets as security for funds of the United States without such power being expressly given, it would seem to be a reasonable deduction that national banks likewise have the power to secure deposits of other public funds by a pledge of their assets.

The greater weight of the court decisions in the various states supports the general principle that banks have power to secure public funds by a pledge of their assets as incidental to the banking business without express statutory authority therefor. *Williams* v. *Hall,* 249 Pac. 755 (Ariz. 1926); *Williams* v. *Earhart,* 273 Pac. 728 (Ariz. 1929); *McPherson* v. *Nat'l Surety Co.,* 212 Pac. 489 (Colo. 1923); *First Amer. Bank & Trust Co. et al.* v. *Town of Palm Beach,* 117 Sou. 900 (Fla. 1928); *Andrews* v. *Odebolt Sav. Bank,* 214 N. W. 559 (Iowa 1929); *Richards* v. *Osceola Bank,* 45 N. W. 294 (Iowa 1890); *U. S. Fidelity & Guar. Co.* v. *Bassfield,* 114 So. 26 (Miss. 1929); *French* v. *School Dist.* 7 S. W. 2d 415 (Mo. 1928); *Consolidated School Dist.* v. *Citizens Sav. Bank,* 21 S. W. 2d 781, (Mo. 1929); *Ainsworth* v. *Kruger,* 260 Pac. 1055 (Mont. 1927); *Bliss* v. *Mason,* 237 N. W. 581 (Neb. 1931); *Melewen* v. *Hunker,* 299 Pac. 1075 (N. M. 1931); *Application of Broderick,* 252 N. Y. W. 68 (N. Y. 1931); *Page Trust Co.* v. *Rose,* 135 S. E. 795 (N. C. 1926); *Richmond County* v. *Page Trust Co.* 142 S. E. 786 (N. C. 1928); *Cameron* v. *Christy,* 133 Atl. 558 (Pa. 1926); *Grigsby* v. *Peoples Bank,* 11 S. W. 2d 673 (Tenn. 1929); *Pixton* v. *Perry,* 269 Pac. 444 (Utah 1928).

117 While the decisions cited are by state courts and deal with the powers of banks other than national banks, they deal with fundamental principles of banking and in the absence of controlling federal decisions are entitled to great weight in arriving at a correct interpretation of the national banking act and the powers thereby conferred. That the trend of the decisions is in favor of the interpretation giving

power to banks to pledge their assets as security for deposits of public funds has been recognized by recent decisions of the federal courts. *Burrowes* v. *Nimocks, County Treasurer,* 35 Fed. 2d, 152 CCA 4; *Schumacher* v. *Eastern Bank and Trust Company,* 52 Fed. 2d 925, CCA 4; see also *Smith* v. *Baltimore and Ohio Railroad Company,* 48 Fed. 2d, 861, D. C. Pa.

The leading cases which announce the minority rule to the effect that banks may not pledge assets to secure public deposits are *Commerciail Banking and Trust Company* v. *Citizens Trust and Guaranty Company,* 153 Ky. 566, 156 S. W. 160, 45 L. R. A. (U. S.) 950, An. Cas. 1915c, 166; *Divide County* v. *Baird, Receiver,* 55 N. D. 45, 212 N. W. 236, 51 A. L. R. 296; *Farmers and Merchants State Bank* v. *Consolidated School District,* 174 Minn. 286, 219 N. W. 163, 65 A. L. R. 1407. Following each of the three cases last cited as found in Annotated Cases and the American Law Reports are annotations reviewing the cases. In the note prefacing the most recent annotation found in 65 A. L. R. p. 1412 the state of the authorities is expressed as follows: "There is a conflict of authority on the question of the power of a bank to pledge its assets to secure general depositors. The weight of authority supports the doctrine that a bank may make such a pledge as security for a deposit of public funds."

The 1930 amendment to Sec. 90, Title 12 seems to be the first and only act of Congress which expressly deals with the powers of national banks to give security for deposits.
118 It does not necessarily follow, however, that it constitutes an implied declaration by Congress that national banks theretofore were without any power whatsoever to give security for deposits. It does not take away or limit the power which banks already had to give security for deposits. Such power as the national banks had before the adoption of the amendment to give security for public funds they had after its adoption even though that power exceeded or otherwise differed from the authority given by a particular state to its banks.

A consideration of the problem has convinced me that national banks had the power before the adoption of the amendment and still have the power to pledge assets to secure deposits of public funds and that The City National Bank of Herrin had the power to pledge its assets to secure the deposit of the public funds of the City of Marion regardless

of the law of the State of Illinois and the said amendment of the federal law.

The foregoing conclusions dispose of the case and make it unnecessary to consider other defenses raised in the defendants' answer.

The plaintiff's bill must be dismissed for want of equity and the temporary restraining order dissolved. Decree in accordance herewith to be prepared and submitted by counsel for the defendants.

Signed FRED L. WHAM,
United States District Judge.

March 21, 1932.

March 21, 32. 119 And on the same day, to-wit: on the 21st day of March, A. D. 1932, there was filed in the office of the Clerk of said Court in said Cause, Findings of Fact and Conclusions of Law, which said Findings and Conclusions were and are in words and figures, the following to-wit:

120 * * (Caption) * *

The court, upon due consideration of the evidence admitted on the trial of the cause and argument of counsel heard, makes the findings of fact, and has reached the conclusions of law herein, as follows:

FINDINGS OF FACT.

1. The plaintiff became the duly qualified and acting receiver of The City National Bank of Herrin, a national bank located in the City of Herrin, Williamson County, Illinois, on October 2, 1931; that the City of Marion, Williamson County, Illinois, is a municipal corporation; that the Continental Illinois Bank and Trust Company is a banking association organized and existing under the laws of the State of Illinois and is located in the City of Chicago and the Fidelity and Casualty Company of New York is a corporation duly licensed to do business in the State of Illinois.

2. The plaintiff, Ben Sneeden, as receiver of The City National Bank of Herrin, is engaged in winding up the affairs of said bank; that said bank failed to open for business on October 21, 1931, and has since remained closed and suspended; that prior to the suspension of said bank it owned

and held certain bonds described in paragraph three of the bill of complaint of a total par value of $21,000.00.

3. On August 25, 1931, one Ray C. Carroll, the City Treasurer of the City of Marion, Illinois, deposited in said The City National Bank of Herr funds of said City of Marion in his name as city treasurer, and on October 21, 1931, the date of the closing of said bank, said Ray C. Carroll as city treasurer of the City of Marion, Illinois, had funds of said city on deposit in said bank in the sum of
121 $16,430.00. The City of Marion, Illinois, before and during all the times aforesaid had adopted and its affairs were being administered under the "Commission Form of Government" as provided by the statutory laws of the State of Illinois.

4. Ray C. Carroll, to qualify under the law as treasurer of the City of Marion, was required to give a bond with good and sufficient surety conditioned for the faithful performance of the duties of the office and the payment of all moneys received by him according to the law and ordinances of said city; that he applied to the Fidelity and Casualty Company of New York to execute said bond as surety and that company agreed to do so provided Carroll would procure a bank which would secure the deposit of the public money of the City of Marion by pledge of some of its assets satisfactory to said surety company; that there was then no bank in the City of Marion; that said Carroll, as treasurer, with William Below, finance commissioner of the City of Marion, and an agent of the Fidelity and Casualty Company of New York, made and entered into an agreement with Joe P. Benson, cashier of The City National Bank of Herrin, that if said Carroll would deposit in said bank the public money of the City of Marion coming into his hands as treasurer, said bank would deposit with the Continental Illinois Bank and Trust Company the bonds described in paragraph three of the bill of complaint to be held by said Continental Illinois Bank and Trust Company for the purpose of securing the safe-keeping and prompt payment of the public money of the City of Marion deposited with said bank; that thereafter the said agreement was executed on behalf of The City National Bank of Herrin by R. A. Karr, vice-president of said bank, the president being out of the city by reason of illness, and Joe P. Benson as cashier, and was transmitted by Mr. Benson to the Continental Illinois Bank and Trust Company with the bonds and securities described in paragraph three of the bill,

and the agreement and bonds were received and the trust was accepted by said Continental Illinois Bank and Trust Company; that thereafter the Fidelity and Casualty Company of New York by reason of and on the strength of the deposit of the city's funds being thus secured, executed the official bond of said Carroll as city treasurer; pursuant to said agreement Ray C. Carroll as treasurer deposited the public moneys 122 of the City of Marion in The City National Bank of Herrin.

5. The bonds described in paragraph three of the bill of complaint are now in the custody of the Continental Illinois Bank and Trust Company which holds them subject to the terms and provisions of the said depositary agreement.

6. Mr. Benson, as cashier of The City National Bank of Herrin, with said Below, finance commissioner, agreed that the bank would pay the City of Marion interest on its public moneys on deposit at the rate of two per cent per annum, payable monthly on average balances in excess of $5,000.00. The City National Bank of Herrin did not execute and deliver to the City of Marion any bond to secure the said deposit in any form whatsoever. The said deposit was on checking account and the city treasurer drew checks against the deposit from time to time in the ordinary course of business which were accepted and paid by the bank.

7. Mr. Benson informed the directors of The City National Bank of Herrin of the arrangement with Mr. Carroll as treasurer of the City of Marion and that the said securities belonging to the bank had been pledged as security for the deposit of the public money of the City of Marion. The matter was discussed at a meeting of the Board of Directors and while no formal action was taken by the Board of Directors, the action taken was acquiesced in by the various directors individually.

8. On June 13, 1930, the Board of Directors of The City National Bank of Herrin at a regular monthly meeting of the Board adopted a resolution empowering the president and the cashier of the bank "to set aside with any third party as trustee any of the unpledged assets of the bank as security for a deposit in said bank of any funds so deposited by any school treasurer, city treasurer, township treasurer, state treasurer, postmaster depositing postal savings funds, or any receiver for any closed bank or other public institution in conformity to law, to secure such deposit which belongs to any of the municipalities or institutions represented by said

depositor, said assets so pledged to be held by the designated trustee as security for the repayment of the said deposit to the order of the said depositor but not as a guarantee of the lawful acts of said depositor in his official capacity. And that any previous action of the president
123 and cashier of the bank in conformity of the above be hereby ratified and confirmed."

9. The City National Bank of Herrin published a statement of its condition the latter part of September 1931, being the only statement of condition published subsequent to July 31, 1931, and therein made no reference to the fact that the bonds and securities described in paragraph three of the bill of complaint had been pledged to secure the deposit of the public money of the City of Marion or that other securities of the bank had been pledged to secure other deposits. In the form of statement of its condition required and published by the bank no provision was made for a statement as to the existence of such pledges.

10. No facts appear indicating bad faith, actual fraud or contemplation of the bank's insolvency at the time the pledge was made on August 28, 1931, on the part of the officers of the bank or of any other party to the transaction and I find there was none.

Conclusions of Law.

1. The City National Bank of Herrin had lawful power under the law of Illinois and of the United States at and during the time here in question to pledge its assets consisting of the bonds described in paragraph three of the bill of complaint to secure the general deposit of the public funds of the City of Marion and the transaction by which it did so was lawful and not ultra vires and void and was not fraudulent as to other creditors and depositors in the bank.

2. The agreement entered into between said bank by and through its vice-president and cashier and Ray C. Carroll as treasurer of the City of Marion whereby the bank agreed to deposit with the Continental Illinois Bank and Trust Company the bonds described in paragraph three of the bill of complaint as security for the public funds of the City of Marion deposited in The City National Bank of Herrin was a lawful agreement, and the agreement in writing dated August 28, 1931, executed by said officers of the bank, and

the acceptance, in writing, of the trust with the bonds deposited therewith, was a lawful agreement and transaction.

124 3. The transaction was authorized and with full knowledge thereof acquiesced in by the Board of Directors of said bank and became and was the binding act of the bank.

4. The receiver of The City National Bank of Herrin is not entitled to recover the bonds so pledged without payment of the deposit in full which the bonds were pledged to secure, and is not entitled to an injunction restraining the enforcement and execution of the terms of the agreement entered into on the 28th day of August, 1931, under which the said bonds were pledged with the Continental Illinois Bank and Trust Company of Chicago, Illinois as security for said deposit.

5. The plaintiff's bill should be dismissed for want of equity at the cost of the plaintiff and the temporary restraining order entered herein should be dissolved.

Signed—FRED L. WHAM

Endorsed: Filed March 21-1932 D. H. Reed, Clerk.

d March 1932.

125 And afterwards, to-wit: on the 26th day of March, A. D. 1932, the following further proceedings were had in said Court in said Cause, and entered of Record, to-wit:

126 * * (Caption) —* *

ORDER OF COURT.

And now on this the 20th day of March, A. D. 1932, it is ordered, adjudged and decreed by the Court that the former temporary restraining order entered in this cause on November 13, 1931, ordering the defendants, City of Marion, Illinois, a municipal corporation, Continental Illinois Bank and Trust Company, a corporation, and the Fidelity and Casualty Company of New York, a corporation, from selling or disposing of any of the bonds and securities mentioned and described in said order, and which said temporary restraining order has been from time to time continued and extended in full force and effect by the various orders and decrees of this Court, be and the same is hereby continued and extended in full force and effect until the 28th day of March, A. D. 1932, at 1:30 o'clock in the afternoon.

The reasons for the entering of this order extending the aforesaid order and decree are that this cause has been heard by the Court, and that the Court has arrived at his conclusions in said case, and that it is expected to enter a formal order herein on the 28th day of March, 1932, at 1:30 o'clock in the afternoon.

127 This order shall expire and is returnable on the 28th day of March, A. D. 1932, at the hour of 1:30 o'clock in the afternoon.

Approved and Ordered Entered at the hour of 10:00 o'clock in the forenoon of the 26th day of March, A. D. 1932.

Signed—FRED L. WHAM
Presiding Judge.

Endorsed: * * (Caption) * * Order of Court. Ent March 26-1932 D. H. Reed, Clerk. Law Offices of Ferrell and Hay First National Bank Building Marion, Illinois.

128 And afterwards, to-wit: on the 28th day of March, A. D. 1932, the following further proceedings were had in said Court in said Cause, and entered of record, to-wit: Entered M. 28, 1932

129 * * (Caption) * *

DECREE.

This cause came on to be heard at this Term and was argued by counsel and thereupon upon consideration thereof it was Ordered, Adjudged and Decreed as follows, viz.:

From the stipulation in writing made by the parties hereto as to the facts the following findings of fact are made:

1. The plaintiff became the duly qualified and acting receiver of The City National Bank of Herrin, a national bank located in the City of Herrin, Williamson County, Illinois, on October 2, 1931; that the City of Marion, Williamson County, Illinois, is a municipal corporation; that the Continental Illinois Bank and Trust Company is a banking association organized and existing under the laws of the State of Illinois and is located in the City of Chicago and the Fidelity and Casualty Company of New York is a corporation duly licensed to do business in the State of Illinois.

2. The plaintiff, Ben Sneeden, as receiver of The City National Bank of Herrin, is engaged in winding up the af-

fairs of said bank; that said bank failed to open for business on October 21, 1931, and has since remained closed and suspended; that prior to the suspension of said bank it owned and held certain bonds described in paragraph three of the bill of complaint of a total par value of $21,000.00.

130 3. On August 25, 1931, one Ray C. Carroll, the City Treasurer of the City of Marion, Illinois, deposited in said The City National Bank of Herrin funds of said City of Marion in his name as city treasurer, and on October 21, 1931, the date of the closing of said bank, said Ray C. Carroll as City Treasurer of the City of Marion, Illinois, had funds of said city on deposit in said bank in the sum of $16,430.00. The City of Marion, Illinois, before and during all the times aforesaid had adopted and its affairs were being administered under the "Commission Form of Government" as provided by the statutory laws of the State of Illinois.

4. Ray C. Carroll, to qualify under the law as treasurer of the City of Marion, was required to give a bond with good and sufficient surety conditioned for the faithful performance of the duties of the office and the payment of all moneys received by him according to the law and ordinances of said city; that he applied to the Fidelity and Casualty Company of New York to execute said bond as surety and that company agreed to do so provided Carroll would procure a bank which would secure the deposit of the public money of the City of Marion by pledge of some of its assets satisfactory to said surety company; that there was then no bank in the City of Marion; that said Carroll, as treasurer, with William Below, finance commissioner of the City of Marion, and an agent of the Fidelity and Casualty Company of New York, made and entered into an agreement with Joe P. Benson, cashier of The City National Bank of Herrin, that if said Carroll would deposit in said bank the public money of the City of Marion coming into his hands as treasurer, said bank would deposit with the Continental Illinois Bank and Trust Company the bonds described in paragraph three of the bill of complaint to be held by said Continental Illinois Bank and Trust Company for the purpose of securing the safe-keeping and prompt payment of the public money of the City of Marion deposited with said bank; that thereafter the said agreement was executed on behalf of The City National Bank of Herrin by R. A. Karr, vice-president of said bank, the president being out of the city by reason of ill-

ness, and Joe P. Benson as cashier, and was transmitted by Mr. Benson to the Continental Illinois Bank and Trust
131 Company with the bonds and securities described in paragraph three of the bill, and the agreement and bonds were received and the trust was accepted by said Continental Illinois Bank and Trust Company; that thereafter the Fidelity and Casualty Company of New York by reason of and on the strength of the deposit of the city's funds being thus secured, executed the official bond of said Carroll as City treasurer; pursuant to said agreement Ray C. Carroll as treasurer deposited the public moneys of the City of Marion in The City National Bank of Herrin.

5. The bonds described in paragraph three of the bill of complaint are now in the custody of the Continental Illinois Bank and Trust Company which holds them subject to the terms and provisions of the said depositary agreement.

6. Mr. Benson, as cashier of The City National Bank of Herrin, with said Below, finance commissioner, agreed that the bank would pay the City of Marion interest on its public moneys on deposit at the rate of two per cent per annum, payable monthly on an average balances in excess of $5,000.00. The City National Bank of Herrin did not execute and deliver to the City of Marion any bond to secure the said deposit in any form whatsoever. The said deposit was on checking account and the city treasurer drew checks against the deposit from time to time in the ordinary course of business which were accepted and paid by the bank.

7. Mr. Benson informed the directors of The City National Bank of Herrin of the arrangement with Mr. Carroll as treasurer of the City of Marion and that the said securities belonging to the bank had been pledged as security for the deposit of the public money of the City of Marion. The matter was discussed at a meeting of the Board of Directors and while no formal action was taken by the Board of Directors, the action taken was acquiesced in by the various directors individually.

8. On June 13, 1930, the Board of Directors of The City National Bank of Herrin at a regular monthly meeting of the Board adopted a resolution empowering the president and the cashier of the bank "to set aside with any third party as trustee any of the unpledged assets of the bank as se-
132 curity for a deposit in said bank of any funds so deposited by any school treasurer, city treasurer, township treasurer, state treasurer, postmaster depositing postal

savings funds, or any receiver for any closed bank or other public institution in conformity to law, to secure such deposit which belongs to any of the municipalities or institutions represented by said depositor, said assets so pledged to be held by the designated trustee as security for the repayment of the said deposit to the order of the said depositor but not as a guarantee of the lawful acts of said depositor in his official capacity. And that any previous action of the president and cashier of the bank in conformity of the above be hereby ratified and confirmed."

9. The City National Bank of Herrin published a statement of its condition the latter part of September, 1931, being the only statement of condition published subsequent to July 31, 1931, and therein made no reference to the fact that the bonds and securities described in paragraph three of the bill of complaint had been pledged to secure the deposit of the public money of the City of Marion or that other securities of the bank had been pledged to secure other deposits. In the form of statement of its condition required and published by the bank no provision was made for a statement as to the existence of such pledges.

10. No facts appear indicating bad faith, actual fraud or contemplation of the bank's insolvency at the time the pledge was made on August 28, 1931, on the part of the officers of the bank or of any other party to the transaction and I find there was none.

Upon the findings of fact hereinabove specially made the following conclusions of law are made and stated:

1. The City National Bank of Herrin had lawful power under the law of Illinois and of the United States at and during the time here in question to pledge its assets consisting of the bonds described in paragraph three of the bill of complaint to secure the general deposit of the public funds of the City of Marion and the transaction by which it did so was lawful and not ultra vires and void and was not fraudulent as to other creditors and depositors in the bank.

133 2. The agreement entered into between said bank by and through its vice-president and cashier and Ray C. Carroll as treasurer of the City of Marion whereby the bank agreed to deposit with the Continental Illinois Bank and Trust Company the bonds described in paragraph three of the bill of complaint as security for the public funds of the

City of Marion deposited in The City National Bank of Herrin was a lawful agreement, and the agreement in writing dated August 28, 1931, executed by said officers of the bank, and the acceptance, in writing, of the trust with the bonds deposited therewith, was a lawful agreement and transaction.

3. The transaction was authorized and with full knowledge thereof acquiesced in by the Board of Directors of said bank and became and was the binding act of the bank.

4. The receiver of The City National Bank of Herrin is not entitled to recover the bonds so pledged without payment of the deposit in full which the bonds were pledged to secure, and is not entitled to an injunction restraining the enforcement and execution of the terms of the agreement entered into on the 28th day of August, 1931, under which the said bonds were pledged with the Continental Illinois Bank and Trust Company of Chicago, Illinois as security for said deposit.

5. The plaintiff's bill should be dismissed for want of equity at the cost of the plaintiff and the temporary restraining order entered herein should be dissolved.

It Is, Therefore, Ordered, Adjudged And Decreed that the bill of complaint herein be and the same is hereby dismissed for want of equity with prejudice to a new action and that the temporary restraining order heretofore entered herein upon motion of plaintiff be and the same is hereby dissolved, and that the defendants recover from the plaintiff their costs herein to be taxed by the Clerk of this Court and that they have execution therefor.

Dated March 28, 1932.

Exception allowed to Plaintiff.

Signed—FRED L. WHAM
District Judge.

134 Endorsed: * * (Caption) * * Decree Filed Mar 28 1932 D. H. Reed, Clerk. Pope & Driemeyer Attorneys and Counsellors at Law 24 North Main Street East St. Louis, Illinois

135 And afterwards, to-wit: on the 12th day of April, A. D. 1932, there was filed in the office of the Clerk of said Court in said Cause, Petition for Appeal, which said Petition for Appeal was and is in words and figures, the following, to-wit:

April 12. 136 * * (Caption) * *

To the Honorable Fred L. Wham, Judge of the District Court of the United States, for the Eastern District of Illinois:

The above named plaintiff, Ben Sneeden, as Receiver of The City National Bank of Herrin, Illinois, feeling himself aggrieved by the decree made and entered in this cause on the 28th day of March, A. D. 1932, does hereby pray an appeal and does appeal from said decree to the Circuit Court of Appeals for the Seventh Circuit for the reasons specified in the assignment of errors which is filed herewith, and he prays that his appeal be allowed and that citation issue as provided by law, and that a transcript of the record, pro-
137 ceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Seventh Circuit, sitting at the City of Chicago, Illinois.

And your petitioner further prays that the proper order touching the security to be required of him to perfect his appeal be made.

HOSEN FERRELL
JOHN HAY
Solicitors for Plaintiff.

138 (Endorsed:) * * (Caption) * * Petition Filed Apr 12 1932 D. H. Reed, Clerk. Law Offices of Ferrell and Hay First National Bank Building Marion, Illinois.

April 12. 139 And on the same day, to-wit: on the 12th day of April, A. D. 1932, there was filed in the office of the Clerk of said Court in said Cause, and Assignment of Errors, which said Assignment of Errors was and is in words and figures, the following, to-wit:

140 * * (Caption) * *

And now comes Ben Sneeden, as Receiver of The City National Bank of Herrin, Illinois, plaintiff in the above entitled cause, and in connection with his petition for appeal in this cause, assigns the following errors which plaintiff avers occurred in the trial thereof and in the decree of the

Court in said cause, and upon which he relies to reverse the decree entered in said cause on March 28, 1932, and appearing of record therein:

1. That the Court erred in making the following conclusion of law in its decree:

"1. The City National Bank of Herrin had lawful power under the law of Illinois and of the United States at and during the time here in question to pledge its assets consisting of the bonds described in paragraph three of the bill of complaint to secure the general deposit of the public funds of the City of Marion and the transaction by which it did so was lawful and not ultra vires and void and was not fraudulent as to other creditors and depositors in the bank."

141 2. The Court erred in making the following conclusion of law in said decree:

"2. The agreement entered into between said bank by and through its vice-president and cashier and Ray C. Carroll as treasurer of the City of Marion whereby the bank agreed to deposit with the Continental Illinois Bank and Trust Company the bonds described in paragraph three of the bill of complaint as security for the public funds of the City of Marion deposited in The City National Bank of Herrin was a lawful agreement, and the agreement in writing dated August 28, 1931, executed by said officers of the bank, and the acceptance, in writing, of the trust with the bonds deposited therewith, was a lawful agreement and transaction."

3. The Court erred in making the following conclusion of law in said decree:

"3. The transaction was authorized and with full knowledge thereof acquiesced in by the Board of Directors of said bank and became and was the binding act of the bank."

4. The Court erred in making the following conclusion of law in said decree:

"4. The receiver of The City National Bank of Herrin is not entitled to recover the bonds so pledged without payment of the deposit in full which the bonds were pledged to secure, and is not entitled to an injunction restraining the enforcement and execution of the terms of the agreement entered into on the 28th day of August, 1931, under which the said bonds were pledged with the Continental Illinois Bank and Trust Company of Chicago, Illinois as security for said deposit."

5. The Court erred in making the following conclusion of law in said decree:

"5. The plaintiff's bill should be dismissed for want of equity at the cost of the plaintiff and the temporary restraining order entered herein should be dissolved."

6. The Court erred in its said decree by dismissing the bill of complaint in said cause.

7. The Court erred in its said decree by dissolving the temporary restraining order entered in said cause.

142 8. The Court erred in its said decree in rendering judgment in favor of the defendants and against the plaintiff for the costs of the defendants in this suit.

Wherefore, the plaintiff prays that the said decree may be reversed and that the District Court be instructed to enter a decree as prayed for in said bill, or should the Court of Appeals deem it advisable and proper, that said decree be reversed and that the Court of Appeals render a proper decree on the record, etc.

HOSEN FERRELL
JOHN HAY
Solicitors for Plaintiff.

143 (Endorsed:) * * (Caption) * * Assignment of Errors. Filed Apr 12 1932 D. H. Reed, Clerk. Law Offices of Ferrell and Hay First National Bank Building Marion, Illinois.

d April 1932.

144 And on the same day, to-wit: on the 12th day of April, A. D. 1932, the following further proceedings were had in said Court in said Cause, and entered of Record, to-wit:

145 * * (Caption) * *

ORDER OF COURT.

And now on this 12th day of April, A. D. 1932, comes the plaintiff in the above entitled cause and files herein his petition for an appeal to the Circuit Court of Appeals for the Seventh Circuit, sitting in Chicago, Illinois, from the decree of this Court, made and entered in this cause on the 28th day of March, A. D. 1932, and also files herein his assignment of errors.

And it is ordered by the Court that the prayer of said petition be and the same is hereby granted, and the appeal from said decree of this Court to the United States Circuit

Court of Appeals for the Seventh Circuit, sitting in the City of Chicago, Illinois, be and the same is hereby allowed upon said plaintiff giving bond conditioned as required by law in the sum of $1000.00.

Enter.

Signed—FRED L. WHAM
Judge.

Endorsed: * * (Caption) * * Order of Court. Ent. Apr 12—1932 D. H. Reed, Clerk. Law Offices of Ferrell and Hay First National Bank Building Marion, Illinois.

147 And afterwards, to-wit: on the 16th day of April, A. D. 1932, there was filed in the office of the Clerk of said Court in said Cause, an approved Appeal Bond, which said Appeal Bond, was and is in words and figures, the following, to-wit: Filed April 1932.

148 * * (Caption) * *

BOND ON APPEAL.

Know All Men By These Presents, That We, Ben Sneeden, as Receiver of The City National Bank of Herrin, Illinois, as principal, and United States Fidelity & Guaranty Company of the City of Baltimore, and State of Maryland, as surety, are held and firmly bound unto City of Marion, Illinois, a municipal corporation, Continental Illinois Bank and Trust Company, a corporation, the Fidelity and Casualty Company of New York, a corporation, and Ray C. Carroll, as Treasurer of the City of Marion, Illinois, in the sum of One Thousand ($1,000.00) Dollars, lawful money of the United States, to be paid to them and their respective excutors, administrators and successors; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors, and administrators, by these presents.

Sealed with our seals this the 14th day of April, A. D. 1932.

The condition of the above obligation is such that, Whereas, on the 28th day of March, A. D. 1932, in the District Court of the United States for the Eastern District of Illinois, in a suit depending in that Court, wherein Ben Sneeden,

as Receiver of The City National Bank of Herrin, Illinois, was plaintiff, and City of Marion, Illinois, a municipal corporation, Continental Illinois Bank and Trust Company, a corporation, the Fidelity and Casualty Company of New York, a corporation, and Ray C. Carroll, as Treasurer of the City of Marion, Illinois, were defendants, numbered on the equity docket as 4494, a decree was rendered against the said Ben Sneeden, as Receiver of The City National Bank of
149 Herrin, Illinois, from which said decree said Ben Sneeden, as Receiver of The City National Bank of Herrin, Illinois has prayed for and obtained an appeal to the United States Circuit Court of Appeals for the Seventh Circuit.

Now, Therefore, the condition of this obligation is such that if the above named Ben Sneeden, as Receiver of The City National Bank of Herrin, Illinois, shall prosecute his appeal to effect and answer all costs, if he fails to make good his plea, then this obligation shall be void, otherwise to remain in full force and effect.

Signed—BEN SNEEDEN (Seal)
As Receiver of The City National Bank of Herrin, Illinois.
UNITED STATES FIDELITY & GUARANTY COMPANY (Seal)
By—Signed D. V. BRADSHAW
Its Attorney in fact (Seal)

Approved as to sufficiency in form this 16th day of April, A. D. 1932.

Signed—FRED L. WHAM
District Judge.

State of Illinois, } ss.
County of Williamson. }

I, Chas. G. Kaufman, a Notary Public in and for county aforesaid, do hereby certify that Ben Sneeden personally known to me to be the Receiver of the City National Bank of Herrin, Illinois, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed, sealed and delivered the said instrument as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal the 15th day of April, 1932.

Sgd—CHAS. G. KAUFMAN
Notary Public.

(Seal)

My commission expires January 6, 1936.

150 State of Illinois, } ss.
County of Williamson. }

I, Geo. G. Otey, a Notary Public in and for county aforesaid, do hereby certify that D. C. Bradshaw as attorney in fact for the United States Fidelity and Guaranty Company of Baltimore, Maryland, and personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged he signed, sealed and delivered the said instrument as his free and voluntary act and as the free and voluntary act of said United States Fidelity and Guaranty Company for the uses and purposes therein set forth.

Given under my hand and notarial seal this the 15th day of April, 1932.

Signed—GEO. G. OTEY
Notary Public.

(Seal)

151 POWER OF ATTORNEY.

(Seal) No. 46612.

Know All Men By These Presents:

That the United States Fidelity and Guaranty Company, a body corporate, duly incorporated under the laws of the State of Maryland, doth hereby constitute and appoint I. A. Palmer, D. C. Bradshaw and M. A. Bradshaw of the City of Herrin, County of Williamson, and State of Illinois to be its true and lawful attorneys in and for the County of Williamson, in the State of Illinois for the following purposes, to wit:

To sign its name as surety to, and to execute, acknowledge, justify upon and deliver any and all stipulations, bonds and undertakings given or required in any judicial action or proceeding brought or pending within the aforesaid County of the said State, or in any judicial action or proceeding over which a United States Court shall exercise jurisdiction.

It being the intention of this Power of Attorney to fully authorize and empower any one of the said I. A. Palmer and the said D. C. Bradshaw and the said M. A. Bradshaw to sign the name of said Company, and affix its corporate seal as surety to any or all of said stipulations, bonds and undertakings, and thereby to lawfully bind it as fully and to all intents and purposes as if done by the duly authorized officers of said Company with the seal of the said Company thereto affixed, and the said Company hereby ratifies and confirms all and whatsoever any one of the said I. A. Palmer and the said D. C. Bradshaw and the said M. A. Bradshaw may lawfully do in the premises by virtue of these presents.

In Witness Whereof, the said United States Fidelity and Guaranty Company, pursuant to a resolution of its Board of Directors, duly passed on the 11th day of January, A. D. 1904, (a certified copy of which is hereto annexed, has caused these presents to be sealed with its common and corporate seal, duly attested by its Vice-President and by its Assistant Secretary, this 24th day of June, A. D. 1930.

UNITED STATES FIDELITY AND GUARANTY COMPANY

By—Signed—CHARLES C. CONLON
Vice-President.

" RODOLPHE H. MOTTU
Assistant Secretary.

State of Maryland, } ss.
City of Baltimore, }

On this 24th day of June, A. D. 1930, before me appears Charles C. Conlon, Vice-President of the United States Fidelity and Guaranty Company, of Baltimore City, Maryland, with whom I am personally acquired, who, being by me duly sworn, says that he is the Vice-President of the United States Fidelity and Guaranty Company; that he knows the corporate seal of said corporation; that the seal affixed to the annexed instrument is such corporate seal; that it was affixed by order of the Board of Directors of said Company; that he signed said instrument as Vice-President of said Company by like authority. The said Charles C. Conlon further says that he is acquainted with Rodolphe H. Mottu and knows him to be the Assistant Secretary of the United States Fidelity and Guaranty Company; that the signature of the said Rodolphe H. Mottu subscribed to said instrument, is the genu-

ine handwriting of said Rodolphe H. Mottu, and was thereto subscribed by like order of the Board of Directors.

My commission expires the first Monday in May, A. D. 1931.

Signed—HENRY F. KREUTZER
Notary Public.

(Seal)

152 Copy of Resolution.

That Whereas, it is often necessary in order to facilitate the business of the Company in States other than Maryland, and in the Territories and in Provinces of the Dominion of Canada and in the Colony of Newfoundland, to have stipulations, bonds and undertakings given or required in judicial actions or proceedings, executed with the least delay and with promptness,

Now, Therefore Be It Resolved, that the President or one of the Vice-Presidents and the Secretary or one of the Assistant Secretaries, be, and they are hereby authorized to appoint one or more persons residing in the States other than Maryland and in the Territories of the United States and in the Provinces of the Dominion of Canada and in the Colony of Newfoundland, to sign the name of the Company as surety to and to execute, acknowledge, justify upon and deliver any and all stipulations, bonds and undertakings given or required in any judicial action or proceeding within any one of the said States or Territories, or Provinces of Canada, or Colony of Newfoundland, and that the said person or persons so appointed are hereby authorized and empowered to sign the name of the Company and to affix its corporate seal as surety to said stipulations, bonds and undertakings, and to sign their names thereto in attestation of same, and thereby to lawfully bind the Company to all intents and purposes, as if done by its duly authorized officers, and the Company through us, its Board of Directors, hereby ratifies and confirms all and whatsoever the said person or persons may lawfully do by virtue of the authority hereby vested in them.

I, Rodolphe H. Mottu, Assistant Secretary of the United States Fidelity and Guaranty Company, do hereby certify that the above and foregoing is a full and correct copy of a resolution passed by the Board of Directors of the said Company at a regular meeting thereof, duly called and held on

the 11th day of January, A. D. 1904, a quorum being present, as the same appears on the records of the Company now in my possession and custody as Assistant Secretary.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the said Company, at the City of Baltimore, Maryland, this 24th day of June, A. D. 1930.

Signed—RODOLPHE H. MOTTU
(Seal) *Assistant Secretary.*

Endorsed: 46612 (Seal) Judicial Power of Attorney From United States Fidelity and Guaranty Company to I. A. Palmer, et al. Herrin, Illinois 6-24-30.

153 Endorsement: E-4494 Appeal Bond Approved & Filed April 16—1932 D. H. Reed, Clerk. Law Offices of Ferrell and Hay First National Bank Building Marion, Illinois.

April 14. 154 And theretofore, to-wit: on the 14th day of April, A. D. 1932, there was filed in the office of the Clerk of said Court in said Cause, Praecipe for Record, which said Praecipe for Record, was and is in words and figures, the following, to-wit:

155 * * * (Caption) * * *

PRAECIPE FOR TRANSCRIPT.

To the Clerk of the District Court:

You will please transmit under your hand and the seal of the District Court to the United States Circuit Court of Appeals For the Seventh Circuit, a true copy:

1. Of all of the pleadings filed in this cause by either party thereto;
2. Of the stipulation of facts upon which this cause was tried by the Court;
3. All of the orders entered by the District Court in this cause, including the decree of the District Court and the order allowing an appeal therefrom, and the findings of fact and conclusions of law made by the Court in this cause;
4. Of the opinion of the Court filed in this cause;
5. Of the petition for appeal;
6. Of the assignment of errors and notice of appeal;

7. Of the Appeal Bond;
8. Of this praecipe for record;
9. Of the citation.

Dated April 14, 1932.

BEN SNEEDEN,
As Receiver of the City National Bank of Herrin, Illinois
HOSEA V. FERRELL and
By (Signed) JOHN HAY
His Attorneys.

Received a copy of the above and foregoing praecipe
156 this 14th day of April, 1932, and each of the defendants in the above entitled cause do hereby waive notice of the presentation to the Court of a petition for appeal from the decree of the Court in this cause and further waive all time provided by the rules of the United States Circuit Court of Appeals for the Seventh Circuit within which to file with the Clerk of the District Court a praecipe for any additional matters desired by them to be certified to the United States Circuit Court of Appeals, it being understood that the praecipe of plaintiff hereinabove written requires and that the Clerk shall transmit to the United States Circuit Court of Appeals, a full and complete transcript of all matters relating to said case and of record or on file in said District Court.

Dated April 14th, 1932.

CITY OF MARION, ILLINOIS, a Municipal Corporation,
CONTINENTAL ILLINOIS BANK AND TRUST COMPANY, a Corporation,
THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, a Corporation, and
RAY C. CARROLL, as Treasurer of the City of Marion, Illinois,
By (Signed) MAYER, MEYER, AUSTRIAN AND PLATT
" POPE AND DRIEMEYER
Their Attorneys.

Endorsed: #4494 In District Court Eastern District of Illinois Ben Sneeden, as Receiver, etc. vs. City of Marion, Ills. Praecipe for Transcript Filed Apr. 14 1932 D. H. Reed, Clerk.

157 United States of America
Eastern District of Illinois } ss:

I, D. H. Reed, Clerk of the United States District Court in and or the Eastern District of Illinois, do hereby certify that the annexed and foregoing is a true and complete transcript of the files and proceedings, in the case of Ben Sneeden, as Receiver of The City National Bank of Herrin, Illinois --vs- City of Marion, Illinois, a Municipal Corporation, Continental Illinois Bank and Trust Company, a Corporation, the Fidelity and Casualty Company of New York, a Corporation, and Ray C. Carroll, as Treasurer of the City of Marion, Illinois, in Equity No. 4494, as fully as the same appears from the originals now on file and of record in my office as Clerk of said Court, and made in accordance with the Praecipe for Record filed in said Cause, and I further Certify that the Citation and return of service thereon incorporated in said record, is the original Citation with return of service, filed in said cause.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at East St. Louis this 11th day of May, A. D. 1932.

D. H. REED
Clerk.

By V. D. RODGERS
Deputy Clerk.

146 United States of America, } ss:

The President of the United States, To City of Marion, Illinois, a Municipal Corporation, Continental Illinois Bank and Trust Company, a Corporation, The Fidelity and Casualty Company of New York, a Corporation, and Ray C. Carroll, as Treasurer of the City of Marion, Illinois Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago, within thirty days from the date hereof, pursuant to Notice of Appeal and Assignment of Errors filed in the Clerk's Office of the District Court of the United States for the Eastern District of Illinois, wherein Ben Sneeden, as Receiver of the City National Bank of Herrin, Illinois is appellant and you are Appellees, to show cause, if any there be, why the judgment rendered against the said Appellant as in the said Notice of Appeal and Assignment of Errors mention, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Fred L. Wham, Judge of the District Court of the United States, for the Eastern District of Illinois, this 12th day of April, in the year of our Lord one thousand nine hundred and thirty-two.

FRED L. WHAM
Judge.

Service of the above citation acknowledged this 14th day of April, A. D. 1932.

POPE AND DRIEMEYER
MAYER, MEYER, AUSTRIAN & PLATT
Attorney for Appellees.

(Endorsed) * * (Caption) * * * Citation Returnable May 12th, A. D. 1932. D. H. Reed Clerk. Filed April 15 1932 D. H. Reed, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 83, inclusive, contain a true copy of the printed record, printed under my supervision and filed on the twenty-second day of June, 1932, on which the following entitled cause was heard and determined:

Ben Sneeden, as Receiver, Etc.,

Appellant,

vs.

City of Marion, Illinois, *et al.*,

Appellees,

No. 4784, October Term, 1932, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 30th day of June, A. D. 1933.

(Seal)

FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court Room in the City of Chicago, in said Seventh Circuit on the sixth day of October, 1931, of the October Term in the year of our Lord One Thousand Nine Hundred and Thirty-One and of our Independence the One Hundred and Fifty-Sixth.

Ben Sneeden, as Receiver of the City National Bank of Herrin, Illinois
4784 *vs.*
City of Marion, Illinois, Continental Illinois Bank and Trust Company, The Fidelity and Casualty Company of New York, and Ray C. Carroll, as Treasurer of the City of Marion, Illinois.

Appeal from the District Court of the United States for the Eastern District of Illinois.

And on, to-wit: On the thirteenth day of May, 1932, there was filed in the office of the Clerk of this court an appearance of counsel for appellee, Continental Illinois Bank and Trust Company, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 4784. October Term 1931.

Ben Sneeden, as Receiver, etc.,

vs.

City of Marion, Illinois, *et al.*

The Clerk will enter my appearance as counsel for the appellee:—Continental Illinois Bank and Trust Company.

CARL MEYER,
DAVID F. ROSENTHAL,
RICHARD MAYER,
1385—231 S. LaSalle St.,
Chicago, Illinois.

Endorsed: Filed May 13, 1932, Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the fourteenth day of May, 1932, there was filed in the office of the Clerk of this court an appearance of counsel for appellee, City of Marion, *et al.*, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 4784. October Term, 1931.

Ben Sneeden, As receiver, etc.,

vs.

City of Marion, Illinois, *et al.*

The Clerk will enter my appearance as counsel for the appellee, City of Marion, *et al.*

C. E. POPE,
H. F. DRIEMEYER,
24 North Main St.,
E. St. Louis, Ill.

Endorsed: Filed May 14, 1932, Frederick G. Campbell, Clerk.

And afterwards, to-wit: One the sixteenth day of May, 1932, there was filed in the office of the Clerk of this court an appearance of counsel for appellant, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 4784. October Term, 1931.

Ben Sneeden, As receiver, etc.,

vs.

City of Marion, *et al.*

The Clerk will enter my appearance as counsel for the appellant.

HOSEA V. FERRELL,
JOHN HAY,
Marion, Illinois.

Endorsed: Filed May 16, 1932, Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the nineteenth day of July, 1932, there was filed in the office of the Clerk of this court a Notice of Motion and Affidavit of Service, which said Notice and Affidavit are in the words and figures following, to-wit:

United States of America. } ss.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

October Term, A. D. 1931.

Ben Sneeden, as Receiver of the City National Bank of Herrin, Illinois,
Appellant,
vs.
City of Marion, Illinois, a Municipal Corporation, *et al.*,
Appellees.

No. 4784.

Appeal from District Court of the United States for the Eastern District of Illinois.

Honorable Fred L. Wham, Judge Presiding.

NOTICE.

To: Hon. Hosea V. Ferrell,
Hon. John Hay,
Marion, Illinois,
Counsel for Appellant;

Hon. Carl Meyer,
Hon. Richard Mayer,
Hon. David F. Rosenthal,
231 S. La Salle St., Chicago, Ill.,
Hon. C. E. Pope,
Hon. H. F. Driemeyer,
East St. Louis, Illinois,
Counsel for Appellees.

Please Take Notice that on Tuesday, the 19th day of July, A. D. 1932, at 10 o'clock in the forenoon (Chicago Daylight Saving Time) before the United States Circuit Court of Appeals, or before such of the judges of said court as shall then be sitting at chambers, being Room No. 752, Federal Building, Chicago, Illinois, the undersigned will move for leave to appear in the above cause as amicus curiae and for leave to file a brief therein, at which time and place you may appear if you see fit. Said motion is supported by the affidavit and suggestions attached thereto, copy of which motion, affidavit and suggestions is handed you herewith.

LELAND K. NEEVES.

Of Counsel:
SCOTT MACLEISH & FALK.

Received a copy of the foregoing notice this ..... day of July, A. D. 1932.

United States of America } ss.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

October Term, A. D. 1931.

Ben Sneeden, as Receiver of the City National Bank of Herrin, Illinois,
Appellant,
vs.
City of Marion, Illinois, a Municipal Corporation, *et al.*,
Appellees.

No. 4784.

Appeal from District Court of the United States for the Eastern District of Illinois.

Honorable Fred L. Wham, Judge Presiding.

State of Illinois, County of Cook. } ss.

JOHN F. McCARTHY being first duly sworn upon oath, deposes and says that he mailed a copy of the attached notice, motion, affidavit and suggestions upon the within named Hon. Hosea V. Ferrell, Hon. John Hay, Hon. Carl Meyer, Hon. Richard Mayer, Hon. David F. Rosenthal, Hon. C. E. Pope and Hon. H. F. Driemeyer, on this 13th day of July, A. D. 1932, by depositing the same in the United States mails on said date, postage prepaid, and duly addressed to them at the following addresses:

Hon. Hosea V. Ferrell, Marion, Illinois;
Hon. John Hay, Marion, Illinois;
Hon. Carl Meyer, 231 S. LaSalle St., Chicago, Ill.;
Hon. Richard Mayer, 231 S. La Salle St., Chicago, Ill.;
Hon. David F. Rosenthal, 231 S. La Salle St., Chicago, Ill.;
Hon. C. E. Pope, East St. Louis, Illinois;
Hon. H. F. Driemeyer, East St. Louis, Illinois.

Further affiant saith not.

JOHN F. McCARTHY.

Subscribed and Sworn to before me this 13th day of July, 1932.

BLANCHE E. NOVAK,
Notary Public.

(Seal)

And on the same day, to-wit: On the nineteenth day of July, 1932, there was filed in the office of the Clerk of this court a motion for leave to appear as Amicus Curiae, affidavit of Leland K. Neeves, and suggestions in support of motion, which said motion, affidavit and suggestions are in the words and figures following, to-wit:

United States of America } ss.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

October Term, A. D. 1931.

Ben Sneeden, as Receiver of the City National Bank of Herrin, Illinois, *Appellant,*

vs.

City of Marion, Illinois, a Municipal Corporation, *et al.*, *Appellees.*

No. 4784.

Appeal from District Court of the United States for the Eastern District of Illinois.

Honorable Fred L. Wham, Judge Presiding.

And now comes Leland K. Neeves, an attorney of the bar of this court, and respectfully moves for leave to appear in the above cause as amicus curiae and for leave to file a brief therein. Said motion is supported by the suggestions and affidavit attached hereto.

LELAND K. NEEVES.

Of Counsel:
SCOTT, MACLEISH & FALK,
134 South La Salle St.,
Chicago, Illinois.

United States of America. } ss.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

October Term, A. D. 1931.

Ben Sneeden, as Receiver of the City National Bank of Herrin, Illinois,
Appellant,
vs.
City of Marion, Illinois, a Municipal Corporation, *et al.*,
Appellees.

No. 4784.

Appeal from District Court of the United States for the Eastern District of Illinois.

Honorable Fred L. Wham, Judge Presiding.

AFFIDAVIT.

State of Illinois, } ss.
County of Cook. }

LELAND K. NEEVES being first duly sworn upon oath deposes and says that he is a member of the bar of this court, and is a member of the firm of Scott, MacLeish and Falk, attorneys at law, Chicago, Illinois; that said firm is counsel for L. Elmer Hulse, Receiver for Waukegan State Bank, a banking corporation organized under the general banking laws of the State of Illinois, and which bank formerly conducted a banking business in the City of Waukegan, Lake County, Illinois; that on, to-wit, June 18, 1931, the Honorable Oscar Nelson as Auditor of Public Accounts of the State of Illinois, by virtue of the authority vested in him by the statutes of the State of Illinois, took possession of the Waukegan State Bank and said bank did not thereafter continue its said banking business, but on the contrary, said bank is now in process of liquidation.

That under date of March 31, 1931, New York Indemnity Company, a New York corporation authorized and licensed to do business in the State of Illinois, executed a certain depositary bond for the purpose, among others, of securing to one Jay B. Morse as County Treasurer of Lake County, Illinois, the obligee named in said bond, the payment of all de-

dopsits made by the said Morse as such County Collector, subject, however, to all of the terms and conditions of said bond, and that said bond was also executed in the name of said Waukegan State Bank as the principal named in said bond, said bond being executed in the name of said bank by one Norman O. Geyer as President of said bank.

That at or about the same time the said New York Indemnity Company entered into a certain depositary agreement with Chicago Trust Company, an Illinois corporation, which said depositary agreement was also executed in the name of said Waukegan State Bank by the said Norman O. Geyer as President thereof, under which said agreement certain United States Liberty Bonds in the aggregate face value of, to-wit, Two Hundred Thousand Dollars ($200,000) were deposited with said Chicago Trust Company for the purpose, among other things, of indemnifying said New York Indemnity Company against any and all liability which said New York Indemnity Company might have or should thereafter incur by reason of its execution of said depositary bond aforesaid.

That at the time of the closing of said Waukegan State Bank, on, to-wit, June 18, 1931, there was on deposit to the credit of said County Treasurer of Lake County, the sum of approximately One Hundred Sixty-six Thousand Dollars ($166,000), and in addition thereto, said County Treasurer held certain Cashiers Checks issued by said Waukegan State Bank, in the aggregate sum of, to-wit, more than Two Hundred Thousand Dollars ($200,000), and that thereafter said County Treasurer by demand made upon said New York Indemnity Company claimed a right of recovery from said New York Indemnity Company under the said depositary bond of the whole amount of sad deposits and said Cashiers Checks.

That after the closing of said Waukegan State Bank by the said State Auditor of Public Accounts of the State of Illinois, the said Auditor appointed one Fred B. Whitney as Receiver of said bank, and that the appointment of said Whitney as Receiver was thereafter duly confirmed by the Circuit Court of Lake County, Illinois.

That shortly before the closing of said Waukegan State Bank, the said Chicago Trust Company consolidated with Central Trust Company of Illinois, said consolidated corporation being known as Central Republic Bank and Trust Company, and that said Central Republic Bank and Trust Company thereupon took possession of and it still has in its possession and control the said Two Hundred Thousand Dollars

($200,000) of Liberty Bonds so deposited with said Chicago Trust Company under the said depositary agreement.

That some time shortly after the appointment of said Whitney as Receiver aforesaid, the said Whitney as such Receiver made a demand upon the said Central Republic Bank and Trust Company for the return to the said Receiver of the said Liberty Bonds, which said demand was then and there refused.

That shortly thereafter, the said New York Indemnity Company filed its bill of complaint in the District Court for the Eastern District of Illinois, Eastern Division, against the said Jay B. Morse as County Collector aforesaid and against the said Waukegan State Bank and said Fred B. Whitney as Receiver aforesaid, for the purpose, among other things, of having applied to the claim of the said County Treasurer against said Waukegan State Bank and against said New York Indemnity Company, the said Two Hundred Thousand Dollars ($200,000) of Liberty Bonds, or so much thereof as might be necessary and for other relief.

That the said Fred B. Whitney as Receiver aforesaid thereafter filed his answer and counterclaim in said proceeding, wherein and whereby, among other things, he denied the authority, right and power of said Waukegan State Bank to enter into said depositary agreement or to execute said depositary bond, and demanded the return of said Liberty Bonds from the said Central Republic Bank and Trust Company and for such other relief as might be proper.

That thereafter, by orders duly made and entered in the said receivership in the Circuit Court of Lake County, the Honorable L. Elmer Hulse was appointed Receiver of said Waukegan State Bank in the place and stead of the said Fred B. Whitney.

That said proceeding so instituted by said New York Indemnity Company is now pending in the said District Court undetermined.

That it is contended in the foregoing cause, by and on behalf of the appellant herein, that the said City National Bank of Herrin, Illinois had no authority, either under the federal statutes or under the law of the State of Illinois, to pledge any part of its assets to secure, either directly or indirectly, the repayment of deposits of public funds; that said purported pledge and deposit of assets was void and of no effect as against said bank, and that appellant as Receiver was entitled to the return thereof.

That the Honorable District Court in its decision in this

cause, decided that said City National Bank of Herrin, Illinois had power and authority under the federal law and independently of the law of the State of Illinois, and also that it had like power and authority under the law of the State of Illinois (certain federal statutes in terms conferring upon national banks the same power to secure deposits of public funds as is conferred upon state banks under the state law.

That the determination of the issues so presented in this cause will have a direct effect upon the rights of the said Receiver of said Waukegan State Bank with respect to the said Liberty Bonds so held by the Central Republic Bank and Trust Company, and if this Honorable Court in this appeal determines the question of the power of a state bank under the law of Illinois so to pledge its assets to secure deposits, its decision unless modified by the United States Supreme Court will have a controlling effect upon the issues raised in the proceeding so brought by the said New York Indemnity Company.

And affiant further saith not.

LELAND K. NEEVES.

Subscribed and Sworn to before me this 13th day of July, A. D. 1932.

BLANCHE E. NOVAK,
Notary Public.

(Seal)

United States of America } ss.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

October Term, A. D. 1931.

Ben Sneeden, as Receiver of the City National Bank of Herrin, Illinois,
Appellant,
vs.
City of Marion, Illinois, a Municipal Corporation, *et al.*,
Appellees.

No. 4784.

Appeal from District Court of the United States for the Eastern District of Illinois.

Honorable Fred L. Wham, Judge Presiding.

SUGGESTIONS.

As shown in the foregoing affidavit, the present appeal involves the issue as to the power of a state bank in Illinois

to pledge its assets, either directly or indirectly, to secure the repayment of deposits of public funds. The Honorable Fred L. Wham in the court below sustained the right of the City National Bank of Herrin, Illinois to pledge its assets to secure public deposits—first, upon the ground that the federal law, apart from state law, conferred such power upon national banks, and second, upon the ground that the federal statute gives to national banks the same power with respect to pledging its assets to secure public deposits as the local state law confers upon local state banks, and Illinois state banks have such power under the law of Illinois.

If this honorable court passes upon the second ground, such decision will be controlling on the same point in the proceedings brought by the New York Indemnity Company, and if this honorable court passes upon the first ground, the decision will have a direct and immediate bearing upon the determination of the question as to the power of a state bank.

Upon the general question as to the right of a bank to pledge its assets to secure the repayment of deposits, either public or private, there is a direct and irreconcilable conflict in the authorities. Many of the decisions are dependent upon local statutes and in Illinois the question is affected by the provision of the Illinois Constitution of 1870 that no Act authorizing or creating corporations or associations with banking powers, nor amendments thereto, shall go into effect or in any manner be in force unless the same shall be submitted to a vote of the people at the general election next succeeding the passage of the same and be approved by all the votes cast at such election for or against such law.

This honorable court knows that hundreds of Illinois banks are now closed and in process of liquidation. The question in issue, therefore, we submit, is of large importance in the State of Illinois and should be decided only after a most careful and painstaking review of the authorities.

We are asking, therefore, that this honorable court permit us to intervene in this cause as amicus curiae and present a review of the authorities upon the issue involved.

Respectfully submitted,

LELAND K. NEEVES.

And on the same day, to-wit: On the nineteenth day of July, 1932, there was filed in the office of the Clerk of this court an appearance of Amicus Curiae, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 4874. October Term, 1931.

Ben Sneeden, As receiver, etc.,

vs.

City of Marion, *et al.*

The Clerk will enter my appearance as Amicus Curiae.

LELAND K. NEEVES,
134 S. La Salle St.,
Chicago, Ill.

Endorsed: Filed July 19, 1932, Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the nineteenth day of July, 1932, the following further proceedings were had and entered of record, to-wit:

Tuesday, July 19, 1932.

Court met pursuant to adjournment and was opened by proclamation.

Present:

Hon. Samuel Alschuer, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal.

Before:

Hon. Samuel Alschuler, Circuit Judge.

4784	Ben Sneeden, as Receiver, etc., *vs.* City of Marion, *et al.*	Appeal from the District Court of the United States for the Eastern District of Illinois.

On motion of Mr. Leland K. Neeves, leave is hereby granted him to appear and file a brief in this cause as amicus curiae on or before August 8, 1932.

4784	Ben Sneeden, as Receiver, etc., *vs.* City of Marion, *et al.*	Appeal from the District Court of the United States for the Eastern District of Illinois.

It is now here ordered that the time for filing brief for appellee in this cause be, and the same is hereby extended to and including September 1, 1932.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held in the United State Court Room in the City of Chicago, in said Seventh Circuit on the fourth day of October, 1932, of the October Term in the Year of our Lord One Thousand Nine Hundred and Thirty-Two, and of our Independence the One Hundred and Fifty-Seventh.

And afterwards, to-wit: On the fourth day of October, 1932, the following further proceedings were had and entered of record, to-wit:

Tuesday October 4, 1932.

Court opened by proclamation.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshall.

Ben Sneeden, as Receiver, etc.
4784 *vs.*
City of Marion Illinois, *et al.*
} Appeal from the District Court of the United States for the Eastern District of Illinois.

It is ordered by the court that this cause be, and the same is hereby set down for hearing on November 4, 1932.

And afterwards, to-wit: On the fourth day of November, 1932, the following further proceedings were had and entered of record, to-wit:

Friday, November 4, 1932.

Court met pursuant to adjournment and was opened by proclamation.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Walter C. Lindley, District Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

Ben Sneeden, as Receiver, etc.,
4784 *vs.*
City of Marion, *et al.*
} Appeal from the District Court of the United States for the Eastern District of Illinois.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and

briefs of counsel and on oral arguments by Mr. Hosea V. Ferrell, counsel for appellant, and by Mr. Richard Mayer and Mr. H. F. Driemeyer, counsel for appellees, and by Mr. Leland K. Neeves, as Amicus Curiae, and the court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the twenty-fifth day of April, 1933, there was filed in the office of the Clerk of this court the opinion of the court, which said opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 4784. OCTOBER TERM, 1932, JANUARY SESSION, 1933.

BEN SNEEDEN, as Receiver of the City National Bank of Herrin, Illinois,
Appellant,

vs.

CITY OF MARION, ILLINOIS, CONTINENTAL ILLINOIS BANK AND TRUST COMPANY, THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, and RAY C. CARROLL, as Treasurer of the City of Marion, Illinois,
Appellees.

} Appeal from the District Court of the United States for the Eastern District of Illinois.

April 25, 1933.

Before ALSCHULER and SPARKS, *Circuit Judges,* and LINDLEY, *District Judge.*

By this action appellant seeks to invalidate a pledge made by the City National Bank of Herrin, Illinois, hereinafter referred to as the Bank, of certain of its assets as security for deposits of the public funds of the City of Marion, Illinois, and to recover the securities pledged. It was tried

upon an agreed statement of facts, and the court dismissed the bill for want of equity.

The pertinent facts are as follows:

The City of Marion had adopted, and during all the times in controversy was operating under, what is commonly known as the "Commission Form of Government," by authority of the Illinois statute. Appellee Carroll, as treasurer of that city, was required to give bond to the city. Cahill's Illinois Statutes, 1931, ch. 24, par. 380. An arrangement was made whereby appellee Fidelity and Casualty Company of New York agreed to execute that bond, and Carroll, in turn, agreed to and did deposit the public moneys of the City of Marion in the Bank, pursuant to an agreement made with it and the Casualty Company whereby certain of the Bank's assets were deposited in escrow with appellee Continental Illinois Bank and Trust Company as security for the repayment of the moneys deposited.

Thereafter the Bank became insolvent, and appellant was appointed receiver. It failed on October 31, 1931, and at that time there was on deposit in it $16,430 of the public funds of the City of Marion.

On November 11, 1931, appellant notified appellees, except Carroll, that he disaffirmed and repudiated the said deposit of securities and the agreement in relation thereto, and demanded that said securities be delivered to him.

It is conceded that the pledge of the assets referred to was authorized by the board of directors of the Bank and was ratified by the board after the pledge was made, and that there is no question concerning the sound financial condition of the Bank at the time the pledge was made.

SPARKS, *Circuit Judge.* The questions presented are: (1) Whether the pledge of securities was within the powers of the Bank and therefore valid; and (2) assuming the pledge to be invalid for lack of power, whether the receiver may recover the securities so pledged.

The courts in this country are not in accord as to whether national or state banks may pledge their assets as security for deposits of public or private money. This diversity of opinion has arisen by reason of the difference of state statutes, and a contrariety of economic views in applying the Federal statute and in formulating state policies.

National banks have only such powers as are given by statute. Their general powers which are applicable to the question before us are to be found in the Act of 1864, as

amended, clause 7, par. 8, ch. 106, 13 Stat. 101; R. S. 5136; 12 USCA Sec. 24, clause seventh, and are as follows:

> "To exercise by its board of directors, or duly authorized officers or agents, subject to law, *all such incidental powers as shall be necessary to carry on the business of banking;* by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; *by receiving deposits;* * *." (Our italics.)

Under the amended Act of June 25, 1930, ch. 604, 46 Stat. 809, 12 USCA Sec. 90 (1932 Supp.), which relates to depositories of public moneys and financial agents of the Government, it is provided that:

> "Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safe-keeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State."

The National Banking Act of 1864 did not expressly give the power to pledge a bank's assets to secure deposits, and if it were thereby granted it was by virtue of an implied power contained in the clause "all such incidental powers as shall be necessary to carry on the business of banking; * * by receiving deposits; * *," *supra.* Since 1864 it seems that Congress has assumed the right of national banks to pledge their assets to secure deposits of certain public funds.[1] Appellant, however, contends that those statutes grant additional powers to national banks relative to the respective funds referred to. This position cannot be maintained because each of the acts, except the one relating to land bank and joint stock land bank deposits, provides for deposits in state as well as in national banks, and of course Congress did not intend to enlarge the powers of state banks. Hence we conclude that in enacting those statutes Congress did not intend to create additional power for national banks in the respect mentioned, but incidentally recognized a power which it thought already existed under a former statute.

Those enactments, however, are not decisive of the ques-

[1] As to receivership moneys, 39 Stat. 121, 12 USCA 192; as to making land and joint stock banks depositories, 39 Stat. 365, 12 USCA 701; as to postal service funds, 39 Stat. 159, 39 USCA 759; as to depositories of public moneys, 45 Stat. 492, 12 USCA 332 (1932 Supp.); as to Indian moneys, 36 Stat. 1070, 25 USCA 156 and 40 Stat. 591, 25 USCA 162; as to the deposit of moneys received from the sale of United States bonds, 40 Stat. 504, 31 USCA 771.

tion before us, and they are indirectly pertinent only as they may bear upon the intention of Congress in passing the amended Act of June 25, 1930, which grants power to national banks to give the same kind of security for the safe-keeping and prompt payment of deposits of the public money of a state or any political subdivision thereof as is authorized by the law of the state in which such bank is located. The 1930 enactment, therefore, narrows the present confroversy to a construction of the law of Illinois relative to the authority, if any, granted by that state to its own banks to secure, by pledge of their assets, public moneys deposited by the treasurer of an Illinois city which is operating under the commission form of government.

The Federal courts have consistently held that the right of priority in the payment of debts due to the government is not an attribute of sovereignty but depends upon the Acts of Congress. *United States* v. *State Bank of North Carolina,* 6 Pet. 29; *United States* v. *State of Oklahoma,* 261 U. S. 253; *Mellon* v. *Michigan Trust Co.,* 271 U. S. 236; *Liberty Mutual Ins. Co.* v. *Johnson Shipyards Corp.,* 6 Fed. (2d) 752; *United States* v. *Middle States Oil Corp.,* 18 Fed. (2d) 231. We know of no state which has held otherwise, and that principle is not here controverted.

Illinois corporations have only such powers as the laws of that state have given them. Those powers may be either express or implied, and the latter class is limited to those powers which are reasonably necessary to carry out those of the former class. *People* v. *Chicago Gas Trust Co.,* 130 Ill. 268; *Calumet etc. Dock Co.* v. *Conkling,* 273 Ill. 318. In this respect banks are no different from any other corporations. If therefore the appellees in the instant case are permitted to prevail it must be on the theory that express statutory power is given by the State of Illinois to pledge assets of the bank as security for deposits; or that such power arises by implication out of the express power granted by the charter to receive deposits. The fact that Federal statutes have impliedly recognized such a procedure in certain instances relative to national banks, does not answer the question now before us, because the only Federal statute here pertinent provides in effect that national banks in Illinois shall not be permitted to guaranty their deposits by a pledge of their assets unless that right is authorized by the law of Illinois in the case of other banking institutions in that State. It must be conceded that Illinois has not expressly granted such right, and if it exists it must be by implication.

Ward v. *Johnson,* 95 Ill. 215, a case decided in 1880, is relied upon by appellees as holding that such implied right exists in that jurisdiction. In that case the bank had been organized under a special charter which, so far as the record discloses, gave no express power to the bank to pledge assets for the security of deposits. After it had engaged in the general banking business for some time it created an "investment department." This was not done by creating a new corporation or a new agency; it was done by merely giving a new name to a branch of business clearly within the original corporate power. Pursuant thereto it segregated and placed in the hands of a trustee for that purpose, a certain amount of mortgage notes which the bank had received as security from those to whom it had loaned money, and upon which loans the bank was receiving annual interest at the rate of ten percent. Using this trust fund as a basis, the bank thereupon issued its investment certificates upon which it guaranteed annual interest at the rate of 7.3 percent, payable quarterly. These certificates, after sale or transfer, were exchangeable for other like certificates in the trustee's hands, or they were redeemable in currency, in the order of their presentation, out of the funds in the hands of the trustee, or which might next come to his hands from the collection of the notes and securities pledged for the redemption thereof. The purchasing of these certificates was open alike to all, including the depositors of the bank. Some general depositors of the bank purchased certain of the certificates, for which they paid by transferring a corresponding amount of their general deposits to the investment department. Others purchased certificates of investment who were not then and had never been depositors of the bank. The bank became insolvent, and the question arose whether the securities assigned to the trustee were held primarily for the protection of the certificate holders, or were available for payment of demands of depositors generally. The court held that the pledge was valid and that the securities were held by the trustee primarily for the protection of the certificate holders. That decision has been cited in many other jurisdictions as holding that Illinois state banks may pledge their assets to secure general deposits, but we think that question was neither raised nor decided in the Ward case. After enumerating the express powers of the corporation, which includes the power to receive money on deposit, the court said, (at page 237):

> "In addition to these express powers there can be no doubt that such corporations possess, also, the implied power to borrow money. Morse on Banks and Banking, 4; *Planters' Bank* v. *Sharp*, 6 Howard (U. S.) 323; *Curtis* v. *Leavitt*, 15 N. Y. 52-3; Brice on Ultra Vires, 122 (Seward's Ed. 109).
>
> "It will not, therefore, be important to determine whether the certificate holders, claiming under the trust deed, are to be regarded as having made deposits or loans for which their certificates were obtained, for in the one case (that of receiving deposits) the requisite power is expressly given to the corporation by its charter, and in the other case (that of borrowing money) it possesses the power by necessary implication. Nor can the right of the corporation to assign or mortgage negotiable instruments which it is authorized to take be questioned. *McIntyre* v. *Preston*, 5 Gilm. 48; *Planters' Bank* v. *Sharp*, *supra*."

It is quite obvious that in using the first two sentences just quoted the Court was discussing the power of the corporation to receive money either by loan or deposit. The last sentence of the quotation of course refers to the bank's general powers to assign or mortgage negotiable instruments which it is authorized to take, whenever it is necessary and proper as an incident to the conduct of its business. The McIntyre case cited in support of the last proposition was an Illinois decision which merely held that an insurance corporation had the power to take a note and to negotiate it in the transaction of its ordinary business. There was no question presented relative to the preference of policy holders or depositors, and no bank was interested in the controversy. In the Planters' Bank case which was also cited, the Court held a Mississippi statute which made it unlawful for any bank within that state to transfer by endorsement or otherwise any note, bill receivable, or other evidence of debt, unconstitutional. That case cited as authority the opinion of Chief Justice Marshall in *United States* v. *Robertson*, 30 U. S. 641, in which case it was assumed without citation of authority that the United States had a right to be secured for a deposit of public funds. In the Robertson case, the Court and counsel, in construing a bond which pledged the entire assets of the bank to secure the deposits of a customs officer, ignored any question of its possible invalidity, although that question constituted the basis for a very strong dissenting

opinion by Mr. Justice Baldwin, in which he called attention to the fact that the point was neither raised by counsel nor noticed in the opinion of the court. The fact that the right of the United States to be secured for the deposit of public funds was assumed by the court and counsel, was in all probability due to the Act of Congress of March, 1797, (ch. 20, sec. 5, 1 Stat. 515, R. S. 3466, 31 USCA Sec. 191), then in force, which established priority of the United States in any claims which it might have against insolvent persons or estates.

Up to this point the Ward case merely premised three elemental propositions upon which it based its conclusions: (1) The bank had express power to receive deposits, (2) it had implied power to borrow money, and (3) as an incident to its business, it had implied general power to assign or mortgage negotiable instruments which it was authorized to take and which it had taken in the general course of its business. The Court then concluded upon the particular facts there presented that the assets of the bank which had been delivered to the trustee constituted a valid pledge of securities for the payment of the certificates of investment to those holding them; and this it did without expressly stating, otherwise than hereafter mentioned, whether the moneys received from the certificate holders constituted loans or deposits. The Court, however, used the following language, (at page 238), "The corporation was authorized to contract and agree with persons desiring to make deposits or loan money as to the terms. It might execute its bond, note or certificate as evidence of the indebtedness, and secure the same by pledge or chattel mortgage, or note, securities, etc., or by real estate mortgage or trust deed, just as should be mutually agreed. And there has been no reason suggested, and we can conceive of none, why providing a system for securing loans and deposits generally in a particular way is objectionable, when it would not be objectionable to conduct a single transaction in that way." This language of the Court is not altogether pertinent to the question presented, for if the money received from certificate holders constituted loans, then the right of the bank to pledge its assets to secure some of its general depositors to the exclusion of others was not before the Court, and in that event whatever the Court said about the right to pledge assets for the security of deposits was beside the question and must be considered as dictum. The mere fact that the Court failed to characterize the moneys thus received either as loans or deposits does not render such language less ob-

jectionable if in fact such moneys were loans. That they did constitute loans we think there can be no question, and as such it may be conceded that the bank had a right to pledge its assets for their payment. It is not contended that they were general or trust deposits, and they had very few characteristics, if any, of limited time deposits, for payment of the certificates in currency could be demanded only in the order of their presentation and only from funds in the hands of the trustee or which might next come to his hands from the collection of the notes and securities pledged for the redemption thereof. The certificates were characterized on their face as investments, and interest thereon was guaranteed by the bank.

Regardless of the Court's statement that it was unnecessary to decide whether the money transactions between the bank and the certificate holders constituted loans or deposits, it is quite obvious that the Court and counsel considered them as loans and so treated them. This fact is quite clearly established by the first sentence of the opinion, "The principal question arising upon this record is, did 'The Merchants, Farmers and Mechanics' Savings Bank' have power to borrow money and issue 'investment certificates' therefor, secured by trust deed, as was here done?" Under those circumstances we are convinced that the moneys paid by the certificate holders for the investment certificates constituted loans to the bank, and were not deposits within the ordinary meaning of that word. Hence, it cannot be said that by the Ward case Illinois has authorized its banks to pledge their assets as security for the payment of certain general depositors, nor has any other Illinois case been brought to our attention which authorizes such procedure. The question therefore comes to us without helpful precedent from that State.

Much has been said by counsel as to the necessity of such procedure and the reasonableness thereof, but it is quite obvious to us that it is neither necessitous nor reasonable. The necessity urged is based upon competition among banks in their ever growing desire to obtain deposits. The employment of such means for that purpose seems to us to be wholly unworthy of, and inconsistent with, the object for which banks are organized, and it is by no means certain from this record that the demand for such procedure is general in its extent, or that it is not actuated by certain depositors rather than by the banks. The apparent necessity arises out of the wrongful practice, and if all banks be prevented from making use of

the practice the result will be the same to all. We are not convinced that such prevention will result in a depletion of deposits for any appreciable length of time, for the risk and inconvenience of personally caring for one's own money, especially if the amount is considerable, is greater than most people desire to assume, and it is fair to say that it is only deposits of sizable proportion that are thus sought to be secured. But whatever value may be ascribed to the method as a means of increasing deposits, that value is far outweighed by the evil results which are more than likely to follow. We are convinced that such power is not reasonably necessary to the carrying out of the express statutory powers which have been granted to national banks, or to state banks in Illinois.

It is argued that inasmuch as a bank may pledge its bills receivable to secure *loans*, by analogy the power to secure a *deposit* in like manner exists. That argument is based upon the premise that there is no real difference between a deposit and a loan, and that in either case the relation of debtor and creditor arises. It is true that there are certain characteristics which are common to each, but we think the later and better reasoned opinions hold that there is a vast difference. To define that difference with exactness would indeed be difficult, and for the purposes of this case it is quite unnecessary to do so. It is sufficient to say that the difference has always been recognized by the bankers both in theory and in practice, and their method of bookkeeping and their published reports fail to reveal any basis for an analogy. The United States government and the various states, including Illinois, recognize the difference as shown by the reports which they require to be published. Congress and the various legislatures have recognized the difference over a period of many years by making it a criminal offense for an insolvent bank to receive *deposits*. This has been done obviously for the purpose of protecting depositors; while on the other hand the overwhelming weight of authority is that a bank has the power to borrow money to meet an emergency or an exigency, such as threatened or temporary insolvency. See *Divide County v. Baird*, 55 N. D. 45, 212 N. W. 236.

It is well to bear in mind that the business of banking is so intimately connected with the public interest that Congress and the legislatures may prohibit it altogether, or may prescribe the conditions under which it may be carried on. In the exercise of that legislative power there is manifested in

all the legislation bearing on American banking a disposition to throw every possible safeguard around the rights and interests of general depositors, and to treat them all fairly, equitably, and impartially. The doctrine of the guaranty of all bank deposits has its advocates and also its opponents, but we have yet to hear of any voluntary public advocacy of guaranteeing a part of the general depositors to the exclusion of others, and securing that guaranty by a pledge of the bank's assets. Legislation looking to that end we apprehend would be quite as unpopular as it would be for a bank publicly to advertise the fact that it was indulging in the practice under the guise of an implied incidental power.

It is said however that the general depositor who is not secured is in no wise injured if at the time of the transaction the bank is solvent, because the bank's cash assets are thereby increased by the amount of the deposit. Appellees, however, are not in a position to urge this point, because the value of the securities pledged exceeded the amount of the deposit by several thousands of dollars. To be sure, if the securities pledged retained their value the excess would eventually return to the bank for the benefit of the other depositors; but if they did not retain their value they might never return and the secured depositor would thus participate in a greater proportion of the bank's assets than that to which it would otherwise be entitled. If the value of the pledged assets should fall below the amount of the deposit, the bank, in order to retain the deposit, might be compelled to make additional pledges and thus further deplete the assets to the prejudice of the other depositors.

Another inequitable feature is apparent in case the bank subsequently becomes insolvent, as happened here. In that event if the pledged assets are sufficient to pay the secured deposit, all the expenses of winding up the affairs of the bank are paid out of the unpledged assets and fall upon the unsecured depositors.

A bank's right to pledge its assets as security for some of its general depositors to the exclusion of others has constituted the basis for many legal controversies in this country, and as a result there is a diversity of judicial opinion. That diversity is due not alone to the differences of economic views but also to differences in the statutes involved. In those cases practically every phase of the question has been very ably discussed, and we deem it unnecessary to refer to them except to classify them with relation to the general facts and the

statutes there presented.[2] Appellees contend that the greater weight of authority upholds the pledge. However, a perusal of those decisions discloses that some are based upon statutes which expressly grant the power, and others upon statutes which contain provisions from which power may rightfully be inferred. Since none of those provisions is present in the Illinois statutes, what appears to be a majority of opinions supporting the pledge, in reality is not such a formidable array of authority on the question presented under the Illinois statutes. Some of the cases referred to deal with deposits of public money, and others deal with individual and corporate deposits other than public money, but we think the same principle applies to each. The power to pledge assets for the security of public money can not, under the decisions of our Supreme Court, be based upon any attribute of sovereignty on the part of the pledgee, but such power must be based upon an express or implied legislative grant. In the absence of an express grant of power, no power by implication should be permitted to prevail unless the facts presented render it reasonably necessary that such implication arise in order fully and fairly to effectuate the express powers granted. We are convinced that that condition does not exist here. Such an

---

[2] Pledge to secure public funds valid by virtue of state statute: *Williams* v. *Hall*, 30 Ariz. 581, 249 Pac. 755 (1926); *Williams* v. *Earhart*, 34 Ariz. 565, 273 Pac. 728 (1929); **Button* v. *Sanguinetti*, 11 Pac. (2d) 1085, (Ariz. 1932); **Ark. La. Highway Improvement Dist.* v. *Taylor*, 6 S. W. (2d) 533, (Ark. 1928); **McGowen* v. *Edwards*, 48 S. W. (2d) 558, (Ark. 1932); *First Nat. Bank* v. *Foss*, 96 Cal. App. 107, 273 Pac. 1085, (1928); **Wood* v. *Imperial Irr. Dist.*, 17 Pac. (2d) 128, (Cal. 1932); **Porter C. Canyon Co. Fire Ins. Co.*, 263 Pac. 632 (Idaho 1928); *Schornick* v. *Butler*, decided by the Supreme Court of Indiana, March 28, 1933. (This decision, however, reverses the decision on the same case originally handed down July 3, 1930, and published in 172 N. E. 181, in which it was held that a statute permitting depositories to pledge certain specified assets in lieu of personal or surety bonds given to secure deposits of public funds did not authorize them to assign or pledge other types of assets to secure the sureties on bonds given to secure the deposits. Since that decision was rendered, the personnel of the Supreme Court of Indiana has changed, and the only member who remains is one who dissented from the original decision.) **City of Louisville* v. *Fidelity & Columbia Trust Co.*, 54 S. W. (2d) 40, (Kentucky 1932. But see also *Comm. Bank and Trust Co.* v. *Cit. Trust Co.*, 156 S. W. 160, a 1913 Kentucky case decided prior to the 1932 statute and the leading one opposed to the granting of the right to pledge.) **Farmers' and Merchants' State Bank* v. *Consolidated School Dist.*, 219 N. W. 163, (Minn. 1928); *US Fidelity and Guaranty Co.* v. *Bassfield*, 148 Miss. 109, 114 So. 26 (1929); *Huntsville Trust Co.* v. *Noel*, 12 S. W. (2d) 751, (Mo. 1928); **Bliss* v. *Pathfinder Irr. Dist.*, 240 N. W. 291 (Neb. 1932); *Snider* v. *Fulton*, ... Ohio ..... (decided by the Court of Appeals of Lucas County, Ohio, Dec. 1932. See also *Ward* v. *Fulton*, 181 N. E. 815, a case decided by the Supreme Court of Ohio in 1932.) **Maryland Casualty Co.* v. *Board of County Com'rs.*, 260 Pac. 1112 (Okla. 1926); *Motherscad* v. *US Fidelity & Guaranty Co.*, 22 Fed. (2d) 644, (8th CCA, Okla. 1927); *City*

implication, viz., that the power to transfer specific assets to secure a general deposit is an incidental power "necessary to carry on the business of banking," is so inconsistent with equity and good conscience and is fraught with such wrongful possibilities that we are not willing to foist it upon the State of Illinois until its legislature or its courts have spoken clearly to that effect. That those bodies have the right if they choose to approve such policy is not denied, but we merely hold that they have not yet done so.

It is argued that inasmuch as money when deposited as a general deposit becomes immediately the property of the bank, and the relation of debtor and creditor thereupon arises, the bank therefore has an inherent right to deal with those deposits in the conduct of its business as it pleases. Personal and property rights are relative terms, and they can be exercised only so far as they do not conflict with the rights of

---

of Portland v. *State Bank*, 214 Pac. 813 (Ore. 1923); **Foster* v. *City of Longview*, 26 S. W. (2d) 1059 (Tex. 1930); **Austin* v. *Lamar*, 26 S. W. (2d) 1062 (Tex. 1930); *Pottorff* v. *El Paso-Hudspeth Counties Road Dist. of Texas*, 62 Fed. (2d) 498 (CCA, 5th Circuit, 1933); *Pixton* v. *Perry*, 269 Pac. 114 (Utah 1928); **US Fidelity & Guaranty Co.* v. *Anderson*, 264 Pac. 1030 (Wyoming 1928).

* These cases hold variously that while the state involved does have its statute, that statute is to be very strictly construed, and not to be extended beyond its express terms, either as to type of securities to be pledged, or the funds to be protected, etc.

Pledge to secure public funds valid because not prohibited by statute: *Richards* v. *Osceola Bank*, 45 N. W. 294 (Iowa 1892); *Andrews* v. *Odebolt Sav. Bank*, 214 N. W. 559 (Iowa 1929); *French* v. *School Dist.*, 7 S. W. (2d) 415 (Mo. 1928); *Ainsworth* v. *Kruger*, 260 Pac. 1055 (Mont. 1927); *Bliss* v. *Mason*, 237 N. W. 581 (Neb. 1931); *Melaven* v. *Hunker*, 299 Pac. 1075 (N. M. 1931); *Page Trust Co.* v. *Rose*, 135 S. E. 795 (N. C. 1926); *Richmond County* v. *Page Trust Co.*, 142 S. E. 786 (a 1928 N. C. case holding pledge to secure private deposit also valid); *Grigsby* v. *Peoples' Bank*, 11 S. W. (2d) 673 (Tenn. 1929). See also *Citizens State Bank* v. *First Nat. Bank*, 157 Pac. 392, a 1916 Kansas case holding that a statute similar to the one construed in *Hirning* v. *Toohey*, *infra*, has reference only to pledge by bank already insolvent, and does not prevent even private pledge by solvent bank.

Pledge to secure public funds valid in accordance with general practice or public policy: *First American Bank & Trust Co.* v. *Palm Beach*, 117 So. 900 (Fla. 1928); *In re Bank of Spencerport*, 255 N. Y. S. 482 (1932). See also: *McFerson* v. *Nat'l. Surety Co.*, 212 Pac. 489 (Colo. 1923), giving no reason for holding such pledge valid; *State Bank of Commerce of Brockport* v. *Stone*, a case decided by the New York Court of Appeals, Feb. 28, 1933, holding that while a pledge to secure a private deposit is invalid, the receiver of an insolvent bank must return the amount of the deposit before he is entitled to the return of the pledged securities; and *Interstate Nat'l Bank* v. *Ferguson*, 30 Pac. 237 (Kan. 1892).

Pledge of securities invalid: *Carter* v. *Brock*, 110 So. 71 (La. 1926); *Divide County* v. *Baird*, 212 N. W. 236 (N. D. 1926); *Hirning* v. *Toohey*, 207 N. W. 462 (S. D. 1926); *Balt. & Ohio R. Co.* v. *Smith*, 56 Fed. (2d) 799, a decision by the Circuit Court of Appeals for the Third Circuit holding a pledge to secure a private deposit invalid.

others. Illinois banks by virtue of their charters have power to do general banking business, which includes the right to receive general deposits. To be sure such a bank owns its assets, and that term includes general deposits, but to say that such bank in the conduct of its business has an unrestricted right to use its assets as it pleases is going further, we think, than the law authorizes. Those who become depositors do so as the result of an express or implied invitation from the bank, and although the bank becomes the owner of the money deposited, it will not, in the absence of legislative authorization, be permitted to use it in such manner as to violate a general depositor's right to be treated fairly, equitably and impartially with all other general depositors.

There is another obstacle which we think defeats appellees' right to prevail in this action. In 1910, Illinois enacted what is known as its Commission Form of Government Act. Cahill's Illinois Revised Statutes, 1931, ch. 24, par. 323, *et seq.* Paragraph 374 deals with the deposit by the city treasurer of the city funds in certain banks. It specifically provides that

> "any such bank, before any such deposit is made therein, * * * shall * execute a good (and) sufficient bond, with sureties to be approved by the president of the said council, and conditioned that such bank will safely keep and account for, and pay over said money. Said president of the council, the commissioner of accounts and finance and the treasurer, in the selection of any such depository bank, shall take into consideration the reputation and solvency thereof, and the sufficiency of the security offered by such bank."

That enactment expressly sets forth what an Illinois bank shall be authorized to do in order to secure a deposit of public funds of a city operating under the Illinois commission form of government, and no implication which is not clear will be permitted to strike down that express requirement. If prior to this enactment, as appellees contend, Illinois had committed itself to the policy of permitting assets to be pledged for the security of deposits, that fact would not prevent a change of that policy whenever the lawmaking authorities of Illinois might consider it expedient to make such change, and their reasons for so doing would not be reviewable by the courts.

Even if it be conceded that appellees have properly construed the Court's language in *Ward* v. *Johnson, supra,* then we say that section 51 of the Illinois Commission Form of

Government Act, (par. 374, ch. 24, *supra*) has superseded the doctrine announced by the Court in that case so far as the facts in the instant case are concerned.

We have refrained from discussing the authorities cited from other courts, because they deal with statutes other than, and different from, the Illinois statutes; or they deal with implied powers which we are convinced do not arise in the instant case, or with economic questions which no doubt were considered by the Illinois Legislature when paragraph 374, *supra*, was enacted, and with which we cannot be judicially concerned.

The question next arises whether section 51 of the Commission Form of Government Act has in any way been modified by subsequent legislation. On June 23, 1919, the "General Banking Act" of Illinois was enacted, and it became effective on December 1, 1920. Cahill's Illinois Revised Statutes, 1931, ch. 16(a). In that Act there is no express authority granting banks power to pledge, or prohibiting them from pledging, their assets for the security of deposits; but under the broad general powers therein granted to form banks and banking associations for the purpose of discount and deposit, buying and selling exchange, and doing a general banking business, it is contended by appellees that the same implications as announced in *Ward* v. *Johnson, supra,* continue to prevail, inasmuch as the general banking powers granted in the former enactments are not materially different from those contained in the Act of 1919.

Whether a statute has been repealed by implication is a question of legislative intention, and there are acknowledged rules for ascertaining that intention. Such repeals are not favored, and one statute will not be considered as repealing another statute by implication unless the later statute is positively repugnant to the former or is a plain substitute for it. The intent to repeal must very clearly appear. *United States* v. *Claflin,* 97 U. S. 546. Such repeals will not be indulged if there is any other reasonable construction. *Peck* v. *Elliot,* 79 Fed. 10; *Chicago, etc., R. Co.* v. *Doyle,* 258 Ill. 624. The presumption against implied repeals has peculiar and special force when the conflicting provisions which are thought to work a repeal are contained in a local or special act and a later and general act. *Petri* v. *Creelman Lumber Co.,* 199 U. S. 487. The presumption is that the special act is intended to remain in force as an exception to the general act. *Rodgers* v.

United States, 185 U. S. 83; *Washington* v. *Miller,* 235 U. S. 422.

Under the circumstances of this case we think there was no intention on the part of the Illinois Legislature to repeal or modify the provisions of paragraph 374, *supra,* by the enactment of the General Banking Act in 1919. The former is a special act and deals with the powers of banks generally. The two are not to be considered as positively repugnant nor offensively inconsistent. It might well be that the Illinois Legislature had good and sufficient reasons for preferring bonds with sureties instead of assets of banks as security for the deposits of cities operating under the commission form of government. This it had a right to do if it so desired, and its reasons therefor cannot be questioned. Subsequent events of which we may fairly take judicial notice may be considered as having somewhat justified that choice.

Appellees urge our consideration of *Williams* v. *Earhart,* 34 Ariz. 565, 273 Pac. 728. In that case the receiver of a bank sued the state treasurer to recover collateral theretofore pledged and delivered by the bank to the treasurer to secure a deposit of public money. The pledge did not consist with the state statute, which provided that a bond with sureties should be given or that a deposit of interest-bearing bonds of the United States should be made with the state treasurer. The state of Arizona was the real beneficiary, and the Court, assuming without deciding that the taking of the pledge was contrary to law, held that the receiver might not repudiate the contract as against the interests of the beneficiary, the State, which was an innocent third party. The Court said:

> "We agree that security of the kind specified in the statute is the only kind the taking of which would exempt the state treasurer from liability on his official bond in case he deposited state money in a designated depository bank, but it by no means necessarily follows that other security, even though it does not exempt the treasurer from liability for the deposit, cannot be used by him for the protection of the latter."

The question before us was not decided by that Court, and the power of a national bank to pledge its assets as security for public funds under a statute similar to the one before us was not in issue. From the quotation above referred to, however, the Court said that the state treasurer still would be liable to the State on his bond because he had not followed the statute, and this means that he would not be released from his bond

because he was not authorized by the statute to do the thing that he did. The Court held, however, that the receiver would not be permitted to repudiate the contract as against the state, an innocent third party. On that phase of the question we do not choose to follow that case, but prefer rather to rely on the reasoning pertinent to that subject in *Baltimore & Ohio R. Co.* v. *Smith*, 56 Fed. (2d) 799.

Paragraph 374, *supra*, expressly provides that before any Illinois bank may receive a deposit of public funds, of the kind herein described, it shall execute a bond with sureties approved by the president of the city council, as security for the return of the money deposited; and it is not authorized to give, nor is the treasurer authorized to accept, other security. Any other construction would render the statute meaningless. In the present case no bond was given by the Bank, and the assets which were deposited in violation of the statute were neither approved by the president of the council, nor were they deposited with the city treasurer except in escrow and under joint control with the surety on the treasurer's original bond, and by these acts appellees hope to circumvent the express terms of the statute. These things neither the treasurer nor the Bank was authorized to do under the Illinois law and the Federal Act of June 25, 1930, *supra*.

Our attention has been called to *Pottorff* v. *El Paso-Hudspeth Counties Road Dist. of Texas*, 62 Fed. (2d) 498. In that case the appellee was organized under a special Act, which among other things, provided that the Treasurer or depository should be governed by the same laws as are provided for depositories of county funds; provided that before any such treasurer or depository should be entitled to receive any funds of the district, it should give bond to the district in amount equal to the funds deposited. Section 517a of the law of Texas relating to depositories of county funds, provided that no bank, or bank and trust company, except where specifically authorized by statute or except in the case of a deposit of public funds, should give preference to any depositor by pledging the assets of the corporation as collateral security. Instead of giving a bond to protect appellee's deposit, part of the bank's assets were pledged. Appellee contended that the statutes should be construed together and that with such construction the pledge was authorized and valid. This contention was sustained and the Court further said that aside from section 517a, ample authority was to be found in the other statutes relied upon, and in the general law. The other stat-

utes referred to were not cited. It will be remembered that the Illinois statutes contain nothing resembling the provisions relied upon in this case.

It may be urged that the equities surrounding the transaction should appeal even to a court of law in arriving at its conclusions on the ground that the pledge was made in good faith and with the approval of the board of directors; but it should also be remembered that the pledge in all probability was made in the absence of and without the knowledge of the unsecured depositors. It is quite obvious that the surety on the treasurer's bond is the moving spirit in this controversy, and it has a perfect right to be. It should neither be criticised nor penalized on account of that fact, but in speaking of equities it should be borne in mind that it voluntarily entered into the contract for which we assume that it received a cash consideration. It voluntarily assumed the risk of accepting a pledge of the assets of an Illinois bank, notwithstanding the fact that that State had granted neither express nor implied power to its banks to make such pledge. Under those conditions we think the surety is in no position to complain.

Appellees' contention that the receiver is without authority to maintain this action is without merit. *Baltimore & O. R. Co.* v. *Smith, supra; Wood* v. *Imperial Irr. Dist.*, 17 Pac. (2d) 128; *Austin* v. *Lamar*, 26 S. W. (2d) 1062. The receiver represents more than the insolvent institution. He also represents all the creditors of that insolvent institution. *Davis* v. *Gray*, 83 U. S. 216; *Franklin Nat'l Bank* v. *Whitehead*, 149 Ind. 560. It is true that ordinarily when two parties have entered into a contract which has been fully executed on both sides, one will not be allowed to set up the defense of *ultra vires* without making some sort of restitution. However, in such a case as has arisen here, there are other parties to be considered in addition to the two contracting parties, namely, the general depositors whose rights have been infringed by the action of the two contracting parties. Restitution would simply continue that wrong against innocent parties. Further, as was stated in *Balt. & O. R. Co.* v. *Smith*, and in *Wood* v. *Imp. Irr. Dist., supra*, there were two acts involved in the transaction under consideration, one, the deposit which was perfectly valid, and the other, the pledge which was invalid. It does not appear to us as worthy of judicial approval that the secured depositor may take advantage of the *ultra vires* act of the bank and assert an estoppel grounded upon such act. It had no right in making the deposit to rely upon a prefer-

ence in the form of an unlawful transfer of assets. Otherwise both parties, bound to realize the illegality of the transfer, might, in the face of such unlawfulness, agree to make the transfer, saying each to the other, "though the transfer is not authorized by law, yet we will make it and accomplish the desired result despite its illegality, for neither may hereafter rescind without restoring the original status." We do not approve of the accomplishment of an illegal result by way of any such unconscionable use of the doctrine of estoppel. We hold with the decisions in the cases cited that the receiver may repudiate the invalid pledge without returning the valid deposit, and that appellees must share with the other general depositors in the distribution of the Bank's assets.

The judgment of the District Court is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

ALSCHULER, *Circuit Judge*, dissenting. I do not concur in the holding that there is in Illinois a public policy against permitting banks to pledge assets for securing public deposits unless authorized by a statute. I believe that *Ward* v. *Johnson*, 95 Ill. 215, sufficiently indicates the view of the Supreme Court that public policy in Illinois is not opposed to such pledges. The case has been quite frequently cited in other jurisdictions to support the proposition that in Illinois such pledge of assets is not contrary to the state's public policy.

The recent case of *People ex rel. Nelson* v. *Peoples State Bank of Maywood*, 266 Ill. App. 330, while not in all respects like that at bar, in my judgment recognizes the binding force of such a pledge; and the reviewing decision of the Supreme Court of Illinois, in an opinion filed October 22, 1932, does not conflict therewith. However, upon the petition of both parties a rehearing has been granted, which at present writing is pending.

It is significant that in a state so commercially important as Illinois, where presumably there have been many such transactions not falling within the provisions of any statute, such pledges, if deemed contrary to the state's public policy, have not long since been denounced by its courts.

It is pointed out, in support of such a public policy of the state, that ordinarily there is secrecy in such pledges of which the general public has no notice, and that depositors not so secured would usually have no means of knowing how much of the bank's reported assets are so segregated.

It seems to me that the vice is not with the pledging of the assets, but with the laws and regulations concerning reports and advertisements of banks. I fully agree that banks should be required to make frequent public reports of their condition, and that in such reports it should be specifically disclosed what part of the reported assets is so pledged. To my mind it is a vicious practice to permit banks to advertise their "resources" at an amount inclusive of their total deposits, without requiring that at the same time, and quite as prominently, there be stated the liabilities to which the resources are subject.

It is also pointed out that such pledging of a bank's assets may, in case of the bank's threatened disaster, enable certain depositors to be favored as against others. This, of course, would bring into the picture collusion and probably fraud, which would be dealt with when it appears, but which is not involved here, where concededly there was no suggestion of circumvention or favoritism, and where, at the time of the pledge, the bank was solvent.

But if it may be said that the policy of the state, or even of the United States, is against such pledges, and that the giving of them was *ultra vires* the bank, another proposition arises which in my judgment would in any event require restoration of the deposits, made in good faith upon the ultimate security of the bank's pledge, before the bank or its representative may be permitted to take back the securities. The case of *State Bank, etc.* v. *Stone,* decided by the New York Court of Appeals February 28, 1933, specifically so decides. In that case it is held that, while the bank was without power to pledge assets to secure a "*private deposit,*" the receiver of the insolvent pledgor bank must pay back the amount of the deposit before he is entitled to a return of the pledged securities. In the case at bar it was the good faith deposit of the bank's securities that enabled the city's treasurer to procure a bond to protect the city against loss through any such deposit; and the bank or its receiver should not be permitted to withdraw the securities without making whole the depositor who, upon the faith of the pledge, deposited the funds in the bank. The bank itself could not properly urge its want of power to make the pledge, in support of its undertaking to recall the pledge, without first making good the deposit; and, as fully reasoned in the New York case, the rights of the receiver are not in this regard different from those of the bank itself if there were no receiver.

It is said that this rule would not apply because there is another party to the transaction, namely, the unsecured depositors and creditors of the bank. As to this contention the New York case is like this one, both having as the "third party" the unsecured depositors and creditors. Without further elaboration thereon I refer to that case and its discussion of the proposition.

In this connection I think it should be considered that in a pledge such as this one the bank's assets are not depleted. The deposit of the public funds made on the strength of the pledged assets becomes the property of the bank and gives to the bank, in additional cash assets, the substantial equivalent of the securities pledged.

But the opinion is further based on the conclusion that by the Illinois Commission Form of Government Act the city and its treasurer are disqualified from depositing, and the bank from receiving, deposit of city funds on any other terms than as the act prescribes, and the subsequent act of Congress referring to state laws specifies. This first act specifies that the city treasurer shall make daily deposits of receipts from all sources of revenue in one or more banks *situated in the city,* to be selected by the president of the council, the commissioner of accounts and the treasurer, or by any two of them, and that before deposit is made therein the bank shall be required to enter into an obligation with the said council to pay interest on deposits at a rate of not less than three per cent per annum, and shall execute bond, with sureties approved by the president of the council, conditioned that the bank will safely keep and account for said money.

These provisions prescribe the duties and direct the conduct of the treasurer and other city officers in the matter of depositing money, but in my judgment they are in no sense or degree a limitation upon the right of a bank to pledge its assets as security for deposits. If in making the deposit the treasurer does not comply with the statute, he may remain personally liable to the municipality for the safety of the deposit, but the act does not deny to banks the right further to secure the depositing municipality or its treasurer or his sureties, by pledge of assets, even though all the statutory requirements have been observed.

It is to be noted that only comparatively few Illinois municipalities are under the Commission Form act, and that the policy in Illinois of permitting the pledging of a bank's

assets as security for deposit of public funds continues to be applicable to those municipalities unaffected by the Commission Form act. I cannot conceive that by the Commission Form act it was intended to distinguish between the two classes of municipalities as to the right of banks to pledge their assets to make secure deposits of municipal funds. The act was in regulation of cities, not banks.

I am well satisfied that the general right of an Illinois bank to pledge its assets to secure deposits of public funds was not withdrawn by the Commission Form act, and that Illinois banks had and have the right to pledge their assets to secure deposits of municipalities under Commission Form of government, as well as of other municipalities.

But in the case of the city of Marion it is particularly to be noted that at this time there were no banks whatever in the city, and it was impossible to comply with the statutory mandate of selecting a bank of that city in which to deposit the city's funds. What then was to be done? Must the city and its treasurer assume the risk of thieves and fire and other perils by keeping the funds in physical possession for lack of express statutory authority to select a depositary elsewhere? In the opinion of October 22, 1932, in *People ex rel. Nelson* v. *Peoples State Bank of Maywood, supra,* it is said:

> "There was no necessity for a law or an ordinance authorizing the village treasurer to deposit the funds in his hands in a bank. That was customarily done. * * * We know of no case in this State in which the legality of the deposit of public funds by their custodian in a bank has been questioned. The reason, no doubt, is, that the practice has been universal and has been recognized as necessary."

The situation was one which evidently the statute did not contemplate, and to my mind the statute did not cover such a contingency and is therefore not applicable to this case. If the statute has no application to a situation such as this, the bank's power to pledge its assets to secure the deposit was not affected by it.

But, even if it were concluded that the Commission Form act had the effect of depriving Illinois state banks of the right to pledge their assets to secure deposits made by Commission Form municipalities, I am of opinion that the amended Act of June 25, 1930, 12 U. S. C. sec. 90 (1932

Supp.), was not intended to restrict or limit national banks in their theretofore quite generally recognized right to pledge their assets to secure deposits of public funds. While in many relations such security is specifically required by federal statute, I believe this act is no inhibition upon pledging assets to secure public funds in those instances where there is no such statutory requirement.

In providing by the Act of 1930 that national banks may give such security for the safe-keeping and payment of public funds as is authorized by the law of the state in which the national bank is located in the case of other banking institutions of the state, the national bank was placed upon the same footing in respect to bidding for public deposits as were the state banks, with which, quite naturally, they were in competition. Far from thereby withdrawing from the national bank the power it theretofore had to pledge its assets to secure deposits of public funds, the act was, in my judgment, an enlargement of its power, so that, in addition to a general right to pledge assets to secure such deposits, it thereafter had the right, notwithstanding any prior inhibition upon national banks from doing some or any of the things in that regard which might in some particular state be done by the banks thereof. The act was calculated to remove any doubt of the right of the national banks to be on the same footing as the state banks of the several states. An interesting side light in connection with the passage of this act appears in the margin.[3]

Instead of thereby withdrawing or restricting any right of national banks to pledge their assets to secure deposits of public funds, the act of Congress undertook only to remove

---

[3] Referring to this legislation there appears in House Report No. 1657, 71st Congress, 2nd Sess., this letter from Acting Secretary of the Treasury Lowman to Committee Chairman McFadden:

"My dear Mr. Chairman: Reference is made to S. 486, 'An act to amend section 5153 of the Revised Statutes, as amended' which passed the Senate April 1, 1930, and which is now pending before the Committee on Banking and Currency of the House of Representatives.

"While the office of the Comptroller of the Currency has consistently taken the position that national banks have the right to give security for the safekeeping and prompt payment of public moneys of the State or political subdivision thereof deposited with such national banking associations, several recent decisions have thrown some doubt on this question with the result that in some States the State banks may secure the public deposits, but the officers of the State are in doubt about depositing with the national banks in the absence of any specific law by Congress on the subject. It would be extremely helpful, therefore, if it is possible for your committee to report out, and the House pass, S. 486."

whatever, if any, possible doubt of such right there might be in any of the states.

We have received copy of an opinion of the Indiana Supreme Court filed March 28, 1933, in *Schornick* v. *Butler*, referred to in note 2 of the opinion herein. The facts there are so like those here, and the discussion is so corroborative of the conclusions stated in this dissent, that I feel justified in commenting thereon.

The appellees, who were directors of a bank, became sureties on the bank's bond to the municipality for public funds which would be deposited in the bank by the municipality. In consideration of becoming sureties, the bank agreed with them that sufficient of its assets should from time to time be set aside and turned over to them as a collateral pledge to insure them against loss upon their bond as sureties. The bank (which the Circuit Court found to have been insolvent at the time the security agreement was made) went into receivership, and action upon the bond was brought by the municipality against the sureties, who thereupon demanded that the agreed collateral be turned over to them. This the receiver of the bank refused to do. Suit was brought by the sureties against the receiver to secure possession of the collateral, and the judgment of the Circuit Court found for the sureties.

The opinion affirming the judgment touches upon several of the propositions I have above considered. The opinion held it to be immaterial whether the assets were pledged directly to the municipality, or to the sureties upon the bond to the municipality for securing the deposit of its funds. It discusses the contention that the pledging of the bank's assets to secure deposits is contrary to public policy, and after some consideration of that question says:

> "We find no constitutional or statutory enactments, no practices of officials or judicial decisions in this state indicating that the pledging of collateral to secure deposits is against public policy. There is nothing inherently wrong or immoral in such a transaction. The only decision of this court upon the subject that we have found upholding such an agreement denies such a policy."

Respecting the equities of such a situation, and as bearing on the proposition that such pledges are *ultra vires* the bank and against public policy, the opinion states:

> "The bank parted with an interest in the securities equal to the deposit subject to the condition that, to the

extent to which it repaid the cash, it would reclaim the securities. It amounts to no more than a sale of securities at their actual value for cash. The general creditors of the bank lost nothing by the transaction, and, if they are affected at all, they are benefited since the bank is more liquid by reason of having the cash rather than the securities. The appellees gained nothing. The public deposit or its proceeds was used, or will be used, for the payment of general creditors of the bank. No more than an equal amount of the pledged notes will be withheld. The action sounds in equity. The general creditors of the bank or the appellant, their representative, cannot be heard to say that the pledging of the securities was illegal while they retained the benefits of the transaction. *Melaven* v. *Hunker, et al.* 299 Pac. 1075. It would be unconscionable to permit the general creditors to profit where they had no loss, at the expense of the appellees, who have profited nothing and have done no wrong. It must not be permitted unless there is some insuperable rule of law which requires it."

The court refers to the public depository law of Indiana, section 12621 (Burns' 1926) which requires banks receiving public deposits to give the municipality a bond to secure the same. Section 12622 provides that in lieu of such bond the bank may pledge specified classes of municipal bonds, or bonds of the United States or of the state of Indiana, to secure such deposits. The securities there agreed to be pledged were not such as the statute authorized a municipality to take, and were not given or to be given to the municipality itself; and so in that case, as in the case at bar, the pledge did not comply with the statute, and to sustain the pledge resort must be had to the general power of a bank to pledge its assets as security for such deposits. As to this the opinion says:

"Our Banking Law gives banks 'all the powers incident and proper, or which may be necessary and usual, in carrying on the business of banking.' The right of a bank to borrow money and pledge its assets for the payment thereof is beyond serious question. It is urged, however, that a deposit is not a loan and that banks have no power to pledge their assets to secure deposits. There is no reason for the distinction. In either case the relation of debtor and creditor is created. It has been expressly

held by this court that an agreement to assign collateral as security for a certificate of deposit will be enforced, and in answer to the contention that the transaction constituted an ordinary deposit and not a loan, the court said:

"'As to how it should be regarded in this respect, whether as a loan or a deposit, is not material under the facts in this case, for if it be considered as an ordinary deposit its effect would be to create the relation of debtor and creditor between appellee and appellant's bank.' *Harris et al.* v. *Randolph County Bank,* 157 Ind. 120.

* * *

"The Legislature recognized the right of a bank to pledge collateral to secure the payment of ordinary deposits when it enacted the depository law. An examination of the title and body of that Act clearly discloses that it was not intended to affect the powers of banks. It merely fixed the terms and conditions upon which public officers may make deposits in banks."

The Indiana statute respecting the general power of banks does not in essence differ from that of Illinois on the same subject. The Schornick opinion recognizes the *power* of banks to make pledge of its securities to secure deposits *of public or private funds;* and the opinion in the Harris case, *supra,* holds that in a private transaction involving an agreement to pledge the bank's assets as security it was immaterial whether the transaction was a loan to the bank or a deposit. Although some cases distinguish as between pledges to secure public and private deposits, and between deposits and loans, I can see no adequate reason for the distinctions. However, in my judgment those distinctions are not material here, where the deposit was of public funds.

The last above quoted paragraph indicates that the public deposit statute of Indiana, in specifying what security for deposits the municipality must require, did not affect the power of the bank to pledge assets, but "merely fixed the terms and conditions upon which public officers may make deposits in banks."

In another place, referring to the contended difference between a deposit and a loan to the bank, and its right to pledge for the latter and not the former, the opinion says:

"The basic contractual obligation to pay is the same and, if when the money is received the bank assigns col-

lateral as a guaranty of its repayment, we know of no rule or reason which would permit the collateral to be retained in one case and not in another.'

The note 2 refers to the unusual circumstance that in a prior opinion in the same case by the same court, filed July 3, 1930, and reported in 172 N. E. 181, conclusions were stated diametrically opposite to those announced in the later opinion. In the first opinion the Circuit Court was reversed; and, petition for rehearing having been granted, in the second judgment was affirmed.

The note also calls attention to the fact that in the interim the personnel of the court had changed, leaving on the bench only one of the five members who participated in the first opinion, and he dissenting therefrom. It is quite true that the first opinion was not unanimous (two dissenting therefrom). The materiality of this is not apparent, beyond indicating the likelihood that in each instance the case had the careful consideration of the court.

Whether tested by the laws and the public policy of the state of Illinois or of the United States, or of both, I believe this pledge of the bank's assets should be sustained; but that, in any event, an order directing return of the securities should be conditioned upon payment of the amount of the deposits to secure which, directly or indirectly, the securities were pledged.

And on the same day, to-wit: On the twenty-fifth day of April, 1933, the following further proceedings were had and entered of record, to-wit:

Tuesday, April 25, 1933.

Court met pursuant to adjournment and was opened by proclamation.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

Ben Sneeden, as Receiver of the City National Bank of Herrin, Illinois,
4784 *vs.*
City of Marion Illinois, Continental Illinois Bank and Trust Company, The Fidelity and Casualty Company of New York, and Ray Carroll, as Treasurer of the City of Marion, Illinois.

Appeal from the District Court of the United States for the Eastern District of Illinois.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Illinois, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the decree of the said District Court in this cause be, and the same is hereby reversed with costs; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this court.

And afterwards, to-wit: On the fifteenth day of May, 1933, there was filed in the office of the Clerk of this court a petition for rehearing, which said petition for rehearing is not copied here.

And afterwards, to-wit: On the twenty-fourth day of May, 1933, there was filed in the office of the Clerk of this court an answer to the petition for rehearing, which said answer is not copied here.

And afterwards, to-wit: On the first day of June, 1933, the following further proceedings were had and entered of record, to-wit:

Thursday, June 1, 1933.

Court met pursuant to adjournment and was opened by proclamation.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

4784 Ben Sneeden, etc. *vs.* City of Marion, *et al.* } Appeal from the District Court of the United States for the Eastern District of Illinois.

It is ordered by the court that the petition for rehearing in this cause be, and the same is hereby denied.

And afterwards, to-wit: On the third day of June 1933, the mandate of this court issued to the District Court of the United States for the Eastern District of Illinois.

And afterwards, to-wit: On the tenth day of June, 1933, there was filed in the office of the Clerk of this court a Stipulation to recall mandate, which stipulation is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

October Term, A. D. 1932.

No. 4784

Ben Sneeden, as Receiver of The City National Bank of Herrin, Illinois,

Appellant,

—*vs*—

City of Marion, Illinois, a Municipal Corporation, Continental Illinois Bank and Trust Company, a Corporation; The Fidelity and Casualty Company of New York, a Corporation, and Ray C. Carroll, as Treasurer of the City of Marion, Illinois,

Appellees.

Appeal from the District Court of the United States for the Eastern District of Illinois.

Honorable Fred L. Wham, Judge Presiding.

STIPULATION.

It is hereby stipulated by and between the parties to the above entitled cause by their respective solicitors that the mandate which was heretofore issued herein may be recalled and stayed herein until the time for filing a petition for certiorari in the Supreme Court herein has expired without such a petition having been filed, or if such a petition be filed, until the same is denied, or if so filed and granted until the case is finally disposed of in the Supreme Court of the United States.

HOSEA V. FERRELL
JOHN HAY
Solicitors for Appellant.

C. E. POPE
H. F. DRIEMEYER
R. T. COOK
CARL MEYER
DAVID F. ROSENTHAL
RICHARD MAYER
Solicitors for Appellees.

June 9th 1933.

And on the same day, to-wit: On the tenth day of June, 1933, the following further proceedings were had and entered of record, to-wit:

Saturday, June 10, 1933.

Court met pursuant to adjournment and was opened by proclamation.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.

Ben Sneeden, as Receiver, etc.
4784 *vs.*
City of Marion, *et al.*

Appeal from the District Court of the United States for the Eastern District of Illinois.

Now this day comes counsel for appellees and presents a motion for recalling and staying the mandate of this court, pending a petition to the Supreme Court of the United States for a writ of certiorari.

On consideration whereof: It is now here ordered that the mandate in this cause be, and the same is hereby recalled and stayed until the further order of this court.

It is further ordered that counsel for appellees proceed with diligence and promptly file the petition for a writ of certiorari in the Supreme Court of the United States and, upon the filing of said petition file in this court proof of the filing of said petition in said court.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 87 to 130, inclusive, contain a true copy of the proceedings had and papers filed, (excepting briefs of counsel, petition for rehearing and answer thereto) in the case of

Ben Sneeden, as Receiver, etc.,
Appellant,

vs.

City of Marion, Illinois, *et al.*,
Appellees.

No. 4784, October Term, 1932, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 30th day of June A. D. 1933.

(Seal)

FREDERICK G. CAMPBELL
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 16, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted, and the case is assigned for argument immediately following No. 128.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.